GOVERNMENT OF THE DISTRICT OF COLUMBIA
# CONTRACT APPEALS BOARD

APPEAL OF:

| | | |
|---|---|---|
| HRGM CORPORATION | ) | |
| | ) | CAB No. D-1201 |
| Under Contracts. with District of Columbia Public Schools | ) | |

For the Appellant: Craig A. Holman, Esq., Holland & Knight, LLP. For the Public Schools: James A. Baxley, Esq., Deputy General Counsel and Monica La Polt, Esq., Attorney-Advisor.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

## OPINION

*(Courtlink Filing ID 2304626)*

Appellant HRGM Corporation ("HRGM") and the District of Columbia Public Schools ("Public Schools" or "District") have filed cross motions for summary judgment on HRGM's appeal for penalty interest under the Quick Payment Act ("QPA"). The Public Schools seek to dismiss the action on the basis that the amounts owed to HRGM, even if paid late, were not paid pursuant to contracts and thus are not subject to the QPA interest. We agree with the Public Schools and dismiss the action.

## BACKGROUND[1]

In 1999, the Public Schools faced a crisis in building maintenance. In order to expedite maintenance contracting for such work, the Public Schools entered into a blanket indefinite-delivery, indefinite-quantity contract with Washington Gas Light Company and Washington Gas Energy Systems, Inc. ("Washington Gas") to perform school maintenance projects. (Complaint ¶ 9). Washington Gas, in turn, subcontracted with Appellant for certain maintenance services. Under the subcontract, Washington Gas would issue work orders to HRGM for Public School work that HRGM could accept or reject. (Complaint ¶ 10). At some point in the year 2000, apparently without consulting Washington Gas, the Public Schools began requesting work directly from HRGM. (Complaint ¶ 11) In response to such requests, HRGM prepared proposals addressed to Washington Gas as prime contractor, but submitted them directly to the Public Schools without Washington Gas approval. (Complaint ¶ 12, Opposition Ex. B). Public Schools officials approved these proposals in writing and directed HRGM to proceed. (*Id.*).

[1] For purposes of reviewing a motion to dismiss, all facts in the complaint are admitted and we construe all facts and inferences in favor of the appellant. *Unfoldment, Inc*, CAB No. D-1062, Mar. 20, 2002, 13 P.D. 8223, 8225, 2002 DCBCA LEXIS 6, 7.

Notwithstanding that Washington Gas never approved the proposals, neither HRGM nor the Public Schools initially recognized these accepted proposals as anything other than subcontracts for work under the Washington Gas contract. At the direction of Public Schools officials, HRGM submitted invoices for the work to Washington Gas. (Complaint ¶ 14). It is believed by HRGM that copies of these invoices were submitted to the Public Schools. (Complaint ¶ 14).

Washington Gas denied liability for any of the invoices. (*Id.*). As noted above, Washington Gas does not appear to have ever approved the proposals submitted by HRGM and accepted by the District. In response to HRGM's complaints that it had not been paid, the Superintendent of Schools requested that HRGM resubmit the invoices to the Public Schools. HRGM resubmitted the invoices on June 28, 2002. (Complaint ¶ 24). On the basis of the resubmitted invoices, the Public Schools requested ratification of the transactions by the Chief Procurement Officer ("CPO") in accordance with Office of Contracts and Procurement ("OCP") Directive 1800.02. In submitting the request for ratification, the Public Schools certified that the services were authorized by the Chief Facilities Officer of the Public Schools, were received between August 2000 and July 2001 and were satisfactorily performed in the total amount of $1,699,982. (DCPS Ratification Package, Opposition Ex. A). The ratification was approved September 16, 2002, (*id.*), and payment was made October 3, 2002. (Opposition, 4).

## DISCUSSION

The Quick Payment Act, D.C. Code § 2-221.01 *et seq.* (2001 ed.), requires interest to be paid for late payment only for work performed under contract. If payment is made other than pursuant to a valid contract, the QPA is inapplicable. The Quick Payment Act is patterned after the federal Prompt Payment Act of 1982, as amended, 31 U.S.C. §§ 3901-3906. *A.S. Mcgaughan Co., Inc.* CAB No. D-897, Aug. 10, 1994, 42 D.C. Reg. 4667. The Comptroller General has held that the federal act does not authorize interest to be paid for delayed payment for work not covered by a valid contract, even if the work was done at the request and for the benefit of the government. *See Maintenance Service and Sales Corp.*, 70 Comp. Gen 664 (1991).

While the Board questions whether the Public Schools dealt with HRGM in good faith by inducing HRGM to perform work and then delaying payment of over $1.6 million owed for the work for more than a year, it does not appear that either HRGM or the Public Schools initially believed that a contract between the Public Schools and HRGM had been formed. Notwithstanding that the work in question was requested and approved by the Public Schools, the record clearly shows that the request was documented by a contract proposal addressed to Washington Gas prepared by HRGM as a subcontractor to Washington Gas, not as a contractor with the Public Schools. (Opposition, Exhibit B). Consistent with a subcontract relationship, HRGM initially submitted billings, not to the Public Schools, but to Washington Gas. It was only after Washington Gas refused to recognize the arrangement that HRGM sought payment from the District. There is no question that the District requested and received the services in question. But it also appears clear that the District never entered into a contract directly with HRGM.

In order to meet its obligation to HRGM, the Public Schools requested ratification of the unauthorized commitments pursuant to Office of Contracting and Procurement Directive 1800.02.[2] "A *ratification* is an action by the CPO to authorize payment for goods or services received by the District without a written contract." *Id.*, §4.2.4. The ratification was approved September 16, 2002.

Since the parties did not initially intend to form contracts for the work between the District and Appellant, and since the payment was made pursuant to a "ratification" of the Chief Procurement Officer, which is authorized only in the absence of a written contract, the Board finds that the payment was not made pursuant to contracts. The Quick Payment Act authorizes interest only on late payments made pursuant to contracts. The complaint must be dismissed for failure to state a claim for Quick Payment Act interest.

**SO ORDERED**

August 19, 2003

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

CONCURRING:

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

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[2] It is unclear why the Public Schools waited so long to seek ratification of this obligation. The contracting problems first came to the attention of the school system at least as early as April 2001. The Public Schools Chief Facilities Officer, alleged to have been responsible for the unauthorized commitment to HRGM, was terminated April 13, 2001 *See Washington Post*, Apr. 14, 2001, B8. That same month, the General Services Administration also began an investigation of the Washington Gas contract. *See, id.*, Apr. 23, 2001, A1. Nevertheless, the Public Schools continued to receive unauthorized work through July 2001. The General Accounting Office issued an audit report concerning the Washington Gas contract in September 2001. *See id.*, Sep. 29, 2001, B1. The request for ratification was not made, however, until August 24, 2002.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

C&F Construction Company ) CAB No. P-0676

Under Solicitation No. POKA-2002-B-0081-JBW )

For the Appellant: Robert Klimek, Esq., Klimek Kolodney & Casale PC. For the Government: Howard Schwartz, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

**OPINION**
(*Courtlink Filing ID 2347562*)

C&F Construction Company ("C&F") has protested against the refusal by the District to consider its bid on the above-mentioned solicitation based on a suspension and possible debarment determined by the Chief Procurement Officer ("CPO") dated June 27, 2003. (Agency Report ("AR") Ex. 3). C&F contends that the CPO's action is an unlawful extension of an expired voluntarily debarment that C&F agreed to with the United States Department of Transportation, or, in the alternative, is an unlawful extension of a *de facto* debarment by the District. The District contends that Federal and District debarment authority is totally independent, that the CPO's suspension and proposed debarment action taken June 27, 2003, was fully authorized and the contracting officer's refusal to consider C&F's bid was proper. The Board agrees with the District that the suspension was proper. Because the suspension was lawful, we see no error in the contracting officer's refusal to consider C&F's low bid. The Board therefore denies the protest. The Board notes, however, that although it does not agree with the protester that the CPO's action was an improper extension of a *de facto* debarment, the record does show a *de facto* suspension by the District from at least as early as November 28, 2000, that was confirmed by a letter dated December 18, 2002. (Reply to Agency Report, Ex. 5). In considering a debarment at this time, the CPO must consider the length of the *de facto* suspension, 27 DCMR §2213.4, as well as the length of the effective debarment by the U.S. Department of Transportation.

**DISCUSSION**

The Chief Procurement Officer is granted authority to suspend or debar a contractor from doing business with the District by the District's Procurement Practices Act, D.C. Code § 2-308.04, which is separate and independent of the authority of the Federal Highway Administration to debar a contractor from any federally funded contracts. 29 CFR, Subpart C. It is axiomatic that the CPO, when he is acting within the authority of District law, is not limited by determinations made by Federal officials, just as the CPO's action cannot limit the action of a Federal official.

Section 2-308.04 of the D. C. Code provides:

> (a)(3)(A) The CPO shall suspend a person or business from consideration for award of contracts or subcontracts for . . .
>
> * * *
>
> (b)(1) Conviction for commission of a criminal offense incident to obtaining or attempting to obtain a public or private contract, or subcontract, or in the performance of the contract or subcontract;

It is undisputed that on December 7, 2001, the president of C&F and C&F entered pleas of guilty to one count of unlawful supplementation of the salary of a government employee in violation of 18 U.S.C. §§ 209(a), 216(a)(1) and payment of a gratuity in violation of 18 U.S.C. 201(c), respectively, arising out of performance of District of Columbia contracts. (Reply, 4). Based on the conviction, the CPO had discretion to suspend C&F as early as December 2001.

The CPO has not yet taken action to debar C&F and thus the propriety of a debarment is not before the Board. There appears to be support in the record that prior to the guilty plea there was a *de facto* suspension of the Protester by the District. A *de facto* suspension occurs where a firm is excluded from contracting because a contracting agency makes repeated determinations of nonresponsibility, or even a single determination of nonresponsibility as part of a long-term disqualification attempt, without following the procedures for suspension or debarment. *See Government Contract Advisory Services, Inc.*, 94-1 Comp. Gen. 181. Beginning in November 2000, the District refused to do business with C&F without a formal suspension proceeding. (Reply, Ex. 1). In December 2002, the Water and Sewer Authority formally notified C&F of the suspension. (Reply, Ex. 5). C&F has not received contracts from the District during the period of its federal suspension and voluntary debarment. Although debarments may be for a maximum of 3 years, it is clear that any action taken now by the CPO based on the 2001 conviction must recognize the suspension or debarment time previously imposed for the same conduct in determining the debarment period, if any. (27 DCMR § 2213.4). In determining C&F's current fitness as a contractor, the contracting officer must also consider C&F's agreement to continuing review of contract performance by an independent reviewer approved by the federal Department of Transportation. (Reply, Ex. 2, ¶ 2.3).

**SO ORDERED.**

August 28, 2003

Matthew S. Watson

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

CONCURRING:

Jonathan D. Zischkau

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

W.M. SCHLOSSER CO., INC. ) CAB No. D-1122
Under Contract No. 4641-72-A1-86 )

For the Appellant: Michael J. Cohen, Esq. For the District of Columbia Government: Jack M. Simmons, III, Esq., Assistant Corporation Counsel, D.C. For the District of Columbia Housing Authority: Patricia Gracyalny, Esq.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

**OPINION**

*CourtLink Filing ID 2357192*

W.M. Schlosser Company, Inc., filed a notice of appeal from a deemed denial of its claim for payment of $395,000 required under a November 1994 settlement agreement with the District plus statutory interest for the more than 8-year period that the settlement amount has remained unpaid. The District and Schlosser had entered into the 1994 settlement agreement to resolve appeals docketed at the Board in 1992 as CAB Nos. D-0905, D-0906, D-0907, D-0908, and D-0911. Schlosser's appeals were from deemed denials of contract claims Schlosser had filed with the District's former Department of Public and Assisted Housing ("DPAH"). There had been a history of problems within DPAH and those difficulties prompted legislative and court action. Effective March 1995, Council legislation created the District of Columbia Housing Authority ("DCHA"), abolished DPAH, and transferred DPAH functions and assets to DCHA. Meanwhile, to resolve a court action pending in Superior Court in *Pearson, et al. v. Kelly*, the District entered into a consent order in May 1995, which appointed a receiver to exercise all powers assigned to the newly created DCHA and its predecessor DPAH. The consent order provided that DCHA would pay settlements and judgments "arising out of claims or actions based upon acts of the employees or agents of DPAH or its successor agency committed during the term of receivership" but the consent order said nothing explicitly about pre-receivership claims against DPAH.

To resolve a dispute between the District and the DCHA receiver regarding who was responsible for paying pre-receivership claims, the District and DCHA entered into an *ex gratia* agreement in 1999 which provides that DCHA would be responsible for all pre-receivership claims of which DCHA had notice but failed to disclose to the District in the District-DCHA agreement. Two of the Schlosser cases, CAB Nos. D-0903 and D-0905, appear on the attachments to the agreement but the other appeal numbers do not. The Board resolved CAB No. D-0903 on summary judgment, determined an amount due to Schlosser, and the District paid Schlosser. After the new appeal in CAB No. D-1122 was filed, the District paid Schlosser an amount to resolve CAB No. D-0905. Schlosser seeks the remaining amounts due under the 1994 Schlosser-District settlement agreement.

We conclude that the District, not DCHA, is responsible for making payment to Schlosser for the remaining amounts due under the Schlosser-District settlement agreement. The District government, not DCHA or its receiver, entered into the settlement agreement with Schlosser because as of November 1994, neither DCHA nor the receivership had been created, and DPAH still existed and was an agency of the District government. The Schlosser-District settlement agreement superseded the original DPAH contract claims, and the settlement agreement does not constitute a "pre-receivership claim" as defined in the District-DCHA agreement. Alternatively, even if we were to conclude that the District-DCHA agreement were meant to cover the Schlosser-District settlement, we believe that the Schlosser settlement was effectively incorporated in the schedules of the District-DCHA settlement agreement. Accordingly, the District shall pay Schlosser $395,000, less the amount the District has already paid Schlosser for CAB No. D-0905, plus interest as provided in the settlement agreement.

## BACKGROUND

Between January 3 and March 17, 1992, Schlosser filed notices of appeal from deemed denials of various claims it had filed regarding Contract No. 4641-72-A1-86 with the District to renovate the Arthur Capper dwellings. Those appeals were docketed at the Board as CAB Nos. D-0903, D-0904, D-0905, D-0906, D-0907, D-0908, and D-0911. The only parties to the appeals were Schlosser and the District government, because DCHA did not come into existence until March 1995. In an order of May 15, 1992, the Board consolidated all of the appeals for further proceedings. In the order, the Board noted that CAB No. D-0904 had been settled and payment had been made by the District but execution of a release was pending. CAB D-0904 was subsequently dismissed by order of May 20, 1994. After the May 1992 consolidation, the parties and the Board generally listed in the case caption for subsequent pleadings all of the case numbers starting with CAB No. D-0903, but starting in approximately September 1993, the District began abbreviating the caption to "CAB No. D-0903, etc." or "CAB No. D-0903, et al."

Schlosser moved for summary judgment only in CAB No. D-0903, which was granted by the Board in a decision dated September 13, 1994, determining the District liable for $644,373 plus interest. The District paid Schlosser. After the Board resolved CAB No. D-0903, only CAB Nos. D-0905, D-0906, D-0907, D-0908, and D-0911 remained pending. With a prehearing conference set for September 28, 1994, and a hearing on the merits scheduled to begin October 3, 1994, the District and Schlosser reached a settlement of the remaining appeals and so informed the Board on September 27, 1994. On October 4, 1994, the District reported that it would pay Schlosser a total of $395,000 under the settlement, with $165,00 due at the time the settlement agreement was executed, $115,000 within 60 days of execution, and the remaining balance within 120 days of execution. (Board order, dated October 4, 1994). Schlosser and the District executed a formal settlement agreement effective November 4, 1994, which provides in relevant part:

Now Therefore, in consideration of the foregoing and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, in compromise, settlement and release of the claims (CAB Nos. D-905, D-906, D-907, D-908 and D-911), the parties agree as follows:

1. W.M. Schlosser Company, Inc. agrees to accept and the District agrees to pay three hundred ninety-five thousand dollars ($395,000) as full settlement of the claims of W.M. Schlosser Company, Inc. (CAB Nos. D-905, D-906, D-907, D-908 and D-911). Such payment is to be made by check to W.M. Schlosser Company Inc. in the amount of $165,000 upon execution of this document with the remaining balance to be paid within 120 days of the execution of this agreement in two (2) payments of $115,000 each. The first payment of $115,000 is due 60 days from the date of execution of this agreement. Such payment is to be made by mailing a check drawn to the order of W.M. Schlosser Company, Inc.

2. Upon payment to W.M. Schlosser Company, Inc. of the $395,000 by the District, W.M. Schlosser and the District hereby release and forever discharge one another and their respective heirs, relatives, predecessors, successors . . . from any and all causes of action . . . which W.M. Schlosser and the District, their heirs, relatives, predecessors, successors . . . may have now or hereafter against one another pertaining to, arising from or relating to the appeals (CAB Nos. D-905, D-906, D-907, D-908, and D-911) and/or any and all matters or actions of either party relating to the claims at issue in CAB Nos. D-905, D-906, D-907, D-908 and D-911.

. . . .

4. The payment of any monies between the District and W.M. Schlosser and Company, Inc., or any amount thereof is not to be construed as the admission of liability on the part of either party but merely as a compromise of the claims (CAB Nos. D-905, D-906, D-907, D-908, and D-911) in such manner so as to avoid litigation, arbitration or any further negotiation o[r] discussion of the claims of W.M. Schlosser and Company, Inc.

5. Upon payment of the $395,000 in full by the District to W.M. Schlosser and Company, Inc., W.M. Schlosser and Company, Inc. agree[s] to file a motion with the Board requesting dismissal of CAB Nos. D-905, D-906, D-907, D-908 and D-911, with prejudice.

6. In the event the District fails to make full payment to W.M. Schlosser and Company, Inc. of the $395,000 within 120 calendar days of execution of this Agreement interest shall accrue on the remaining balance at the statutory rate of interest until paid.

7. This Agreement contains the entire agreement between the parties hereto and the terms of the Agreement are contractual and not mere recital. This Agreement may be amended only by written instrument executed by the parties. The parties have carefully read and understand the contents of this Agreement and signed the same of their own free will and after consulting with their attorneys, and it is the intention of the parties to be legally bound hereby. No other prior contemporaneous agreements, oral or written, respecting or relating to the subject matter of the Agreement shall be deemed to exist in any way or bind any of the parties.

8. Both W.M. Schlosser and Company, Inc. and the District shall bear their own costs with respect to the negotiation and drafting of this Agreement and with respect to all acts required by the terms hereof to be undertaken and performed by them respectively.

. . . .

11. Each of the undersigned warrants that he or she is an authorized representative of the party designated, is authorized to bind such party, and accepts this Agreement on that party's behalf.

Andrew Schlosser signed the settlement agreement on behalf of Schlosser and J.W. Lanum (a DPAH contracting officer) signed on behalf of the District of Columbia government.

In a status conference on December 12, 1994, Schlosser reported that it had received no payment from the District although the settlement agreement had been executed a month earlier. In a status report filed by the District on December 16, 1994, captioned "CAB No. D-903, etc.", the District stated:

> The Office of the Contracting Officer has reported to counsel that the settlement agreement in D-905, etc. has been forwarded to the Office of the Comptroller and that the first One Hundred and Thirty-five Thousand Dollars ($135,000) in payment has been escrowed. However, it has been reported back to the Office of Contracting Officer and Civil Division of the Corporation Counsel's Office that no payments will be forthcoming, except on matters involving health and public safety, before the end of the year. There is no further information from the Comptroller as to when judgments or settlements will be paid or when funds will be released.

The District has never made the payments called for under the Schlosser-District settlement agreement. It is clear from a review of the pleadings in CAB Nos. D-0903 through D-0911 that counsel for the District generally referred to the consolidated cases using the first appeal number of the series. Thus, CAB No. D-0903 was the lead appeal number in the series prior to the Board's summary judgment decision in September 1994, and CAB No. D-0905 became the lead appeal number in the series thereafter.

There had been a history of problems within DPAH and those difficulties prompted legislative and court action. Effective March 1995, Council legislation created DCHA, abolished DPAH, and transferred DPAH functions and assets to DCHA. Although DCHA was created as an instrumentality of the District government, it was to have a legal existence separate from the District government. Meanwhile, to resolve a court action pending in Superior Court in *Pearson, et al. v. Kelly*, the District entered into a consent order in May 1995, which appointed a receiver to exercise all powers assigned to the newly created DCHA and its predecessor DPAH.

Like the underlying 1992 appeals involved in this case, there were a variety of claims that had been asserted against the District and DPAH prior to the creation of DCHA and the receivership. The *Pearson* consent order stated that DCHA would pay settlements and judgments "arising out of claims or actions based upon acts of the employees or agents of DPAH or its successor agency committed during the term of receivership" but the consent order said nothing explicitly about pre-receivership claims. The District and the DCHA receiver could not agree on who was responsible for paying pre-receivership claims. That issue arose in a number of cases filed with the Board as well as in other types of cases filed before other tribunals. While the issue was being litigated in the Court of Appeals, the District and DCHA entered into an agreement in 1999 to resolve this intra-governmental dispute. The 1999 agreement provides in relevant part:

> The District of Columbia ("District") and the D.C. Housing Authority ("DCHA") hereby agree as follows:
>
> 1. It is in the public interest to resolve their respective responsibilities for "pre-receivership" and "post-receivership" claims (as defined below in paragraph 2.). All pre-receivership claims which have been presented in writing to DCHA (or to its predecessor agencies) are listed on Attachment A.
>
> 2. For purposes of this Agreement, "pre-receivership claims" are (i) contract claims arising from causes of action that occurred prior to May 19, 1995 under contracts entered into by the Department of Public and Assisted Housing ("DPAH") or the Department of Housing and Community Development ("DHCD"); (ii) employment actions occurring prior to May 19, 1995, concerning DPAH or DHCD employees and (iii) injuries occurring prior to May 19, 1995, from tortious acts or omissions of DPAH or DHCD employees or agents. The "post-receivership claims" are contract, employment, and tort claims against DPAH or DCHA arising on or after May 19, 1995.
>
> 3. The District and DCHA accordingly agree that - -

a. In settlement of the parties dispute over who should pay the pre-receivership claims - - which they recognize may exceed [redacted amount] million (including accrued interest) - - DCHA will pay the District [redacted amount] million ex gratia to avoid further litigation costs by DCHA associated with outstanding pre-receivership claims. This payment shall be made by check payable to the D.C. Treasurer and delivered to the Office of the Corporation Counsel ("OCC"). At the District's option, the payment shall be either 1) in two amounts, on in FY 1999 and one in FY 2000, or 2) paid in one amount into a special fund designated by the District. The payment, or if the District so elects, the first payment, shall be made upon delivery of the quitclaim deed for the public housing properties described below in paragraph 3.f.1. If the District elects two payments, the second payment shall be made by November 1, 1999.

b. The District will assume sole responsibility for liability arising from (i) the pre-receivership cases listed in Attachment A, (ii) pre-receivership claims, not appearing on Attachment A, which have not been presented in writing to DCHA, DHCD, or to DPAH prior to the date of this agreement; and (iii) pre-receivership claims (that is, claims arising before the entry on May 19, 1995 of the order in *Pearson v. Kelley*, No. 92-CV-14030 (D.C. Super. Ct., Graae, J.), not appearing on Attachment A, which arise out of the cases listed in Attachment B. DCHA warrants that all contract and employment claims filed with DPAH or DCHA on or before May 19, 1995 have been preserved by DCHA and will be made available to the District upon request. Notwithstanding any other provision of this agreement, the District shall not be liable for any liability resulting from DCHA's refusal to reinstate any employee pursuant to an administrative or court order, but the District shall be liable for back pay for pre-receivership employment claims as defined in paragraph 2(ii) above.

c. DCHA will assume sole responsibility for post-receivership claims (that is, claims arising after the entry on May 19, 1995 of the order in *Pearson v. Kelly*, No 92-CV-14030 (D.C. Super. Ct., Graae J.)), and for all pre-receivership claims presented in writing to DCHA or to DPAH, prior to the date of this Agreement, but not appearing on Attachment A, except (iii) all pre-receivership claims arising out of the cases listed in Attachment B. DCHA shall be responsible for any liability arising out of its refusal to reinstate an employee pursuant to an administrative or court order.

d. In all forums, administrative and judicial, the District's and DCHA's legal positions will be consistent with this agreement. The parties promptly will file praecipes, motions, or other documents, including withdrawals of oppositions, as appropriate, in pending proceedings, in order to effectuate the purpose of this agreement. DCHA will cooperate with and support the District's litigation by making available for the District all documents and witnesses (pre-trial and at trial) the District may need in all cases involving DCHA or DPAH.

Corporation Counsel signed the agreement on behalf of the District and the court-appointed receiver, David Gilmore, signed on behalf of DCHA.

Attachment A of the Agreement lists categories of "Contract Claims – in Litigation", "Contract Claims – Not in Litigation", "Contract Claims – Status Unknown", and several other categories not pertinent here. Under "Contract Claims – in Litigation" are the following:

| | | |
|---|---|---|
| 1. | Schlosser | $382,526 plus interest from 5/1/91 |
| 2. | Schlosser | $644,373 plus interest from 8/22/91 |
| . . . . | | |
| 4. | Schlosser | $1,400,000 |
| . . . . | | |
| 17. | Schlosser | $18,533 claim |
| 18. | Schlosser | $7,920 claim |
| 19. | Schlosser | $39,837 claim |
| 20. | Schlosser | $174,946 claim |
| 21. | Schlosser | $27,754 claim |
| . . . . | | |

Item 2 from Attachment A appears to refer to CAB No. D-0903, showing the liability amount we determined in our summary judgment decision of September 13, 1994, and the interest date matching the date that Schlosser filed its claim with the former Director of the Department of Administrative Services (which is the date for calculating when interest begins to accrue). The other items do not relate to any of the other consolidated appeals at issue.

Attachment B of the Agreement consists of 17 pages listing 634 claims, entitled "Lawsuits Selected Under Search Criteria (Listed by Date Served)," where the search criteria were for lawsuits involving DPAH and DCHA. Attachment B is in tabular form with columns for "File name", "CA [civil action or case number] Number", "Court", "Date Served", "Section" [presumably the section of the Office of Corporation Counsel to which the case was assigned], "Attorney", "Matter Type", "Agency", "Dispdate", "DatePaid", "Amount paid", "Disposition", "Description", and "Location". Two of the Schlosser cases, CAB Nos. D-0903 and D-0905 appear on pages 4 and 5 of Attachment B. Page 4 shows the following entry:

> File Name: W.M.Schlosser, CA Number: CAB D-903, Court: CAB, Date Served: 7/02/93, Section: Special Li[tigation], Attorney: Finch, Art 23, Matter Type: Contract Breach, Agency: Housing-DP, DispDate: [blank], DatePaid: [blank], Amount paid: 0, Disposition: [blank], Description: CAB No. 4641-72-A1-86 [which is the contract number, not the CAB case number], Location: [blank].

Page 5 shows the following entry:

File Name: Schlosser, CA Number: CAB D-905, Court: CAB, Date Served: 7/03/94, Section: Special Li[tigation], Attorney: Finch, Art 22, Matter Type: Contract Award, Agency: Housing-DP, DispDate: [blank], DatePaid: [blank], Amount paid: 0, Disposition: [blank], Description: [blank], Location: [blank].

With apparently no prospects for receiving payment under the Schlosser-District settlement agreement, Schlosser filed the new appeal in CAB No. D-1122, claiming breach of the settlement agreement, and seeking the payment of the principal amount plus interest due under the agreement. Thereafter, the District paid Schlosser an amount to resolve the amount originally claimed under CAB No. D-0905, which totals less than approximately five percent of the $395,000 amount specified in the settlement agreement. According to the District, it was not obligated to pay the remaining amount of the settlement agreement because it was not obligated under the District-DCHA agreement to pay the underlying claims in CAB Nos. D-0906, D-0907, D-0908, and D-0911. The District moved to dismiss itself from the appeal on the ground that DCHA is responsible for paying the remaining unpaid amount provided in the Schlosser-District settlement agreement. DCHA opposes the District's motion and argues that the District is responsible for the entire payment under the settlement agreement.

**DISCUSSION**

Both the District and DCHA agree that the Board has jurisdiction to resolve the matter.

The District argues that the express language of the District-DCHA agreement requires DCHA to pay the settlement amounts covering the underlying claims arising from CAB Nos. D-0906, D-0907, D-0908, and D-0911. Under paragraph (c) of the agreement, DCHA is responsible for all pre-receivership claims not appearing on Attachment A or Attachment B. Because those appeal numbers do not appear on either Attachment, the District urges that DCHA is responsible for amounts representing the settlement of those underlying claims.

DCHA agrees that all of the underlying appeals, including D-0903 and D-0905, were pre-receivership claims as defined by the District-DCHA agreement. However, DCHA points out that the District negotiated and executed a settlement agreement resolving the claims before DCHA was created. In addition, DCHA argues that D-0906, D-0907, D-0908, and D-0911 "arise out of" D-0903 because all of the appeals were consolidated by the Board under D-0903. Finally, DCHA argues that the purpose of the District-DCHA agreement, and schedules of Attachment A and B listing the claims and case numbers, was to make DCHA responsible for claims for which it had notice but the District did not have notice. Here, the District clearly had notice of D-0906, D-0907, D-0908, and D-0911 because it handled the original appeals from the initial filing to settlement.

We conclude that the District is responsible for the balance of the principal plus interest due under the Schlosser-District settlement agreement. That settlement agreement superseded and extinguished the original DPAH contract claims, and the Schlosser-District settlement agreement does not constitute a "pre-receivership claim" as defined in the District-DCHA agreement. The District-DCHA agreement defines "pre-receivership claims" in relevant part as "contract claims arising from causes of action that occurred prior to May 19, 1995 under contracts entered into by [DPAH] or the Department of Housing and Community Development. . . ." The contract claim here is a claim that the District breached its settlement agreement with Schlosser. Although at one time the individual claims in CAB Nos. D-0905, D-0906, D-0907, D-0908, and D-0911 were contract claims which had been submitted through the disputes process, including by appeal to the Board in 1992, those individual claims were superseded by the Schlosser-District settlement agreement. When Schlosser and the District executed the settlement agreement, the individual claims in the appeals were extinguished. The District government, and only the District government, not DCHA or the receiver, was the party who became liable under the terms of the settlement agreement to pay the settlement amount.

Even if we were to conclude that the Schlosser-District settlement agreement somehow fit within the definition of "pre-receivership claim", we would nevertheless conclude that the reference to D-0905 in Attachment B was intended by the parties to embrace the Schlosser-District settlement agreement which superseded not only CAB No. D-0905 but also the appeals in CAB Nos. D-0906, D-0907, D-0908, and D-0911 which had been consolidated under D-0905 once the Board had resolved the former lead case of CAB No. D-0903. The District itself repeatedly referred to all of the remaining appeal cases under the label "D-905, etc" and clearly had knowledge of these cases since the Corporation Counsel had represented the District in these cases from the initial filings in 1992 through the settlement agreement in 1994 and thereafter when the Board asked for status of the District's payment pursuant to the settlement agreement with Schlosser. Under the circumstances, it would be inequitable for the District to thrust the Schlosser-District settlement liability onto DCHA simply because D-0906, D-0907, D-0908, and D-0911 were omitted from Attachment B of the District-DCHA agreement. In our view, these cases did not have to be listed at all in the District-DCHA agreement because the Schlosser-District settlement agreement does not constitute a "pre-receivership claim" under the District-DCHA agreement.

## CONCLUSION

We conclude that the District, not DCHA, is responsible for making payment to Schlosser for the remaining amounts due under the 1994 Schlosser-District settlement agreement. Accordingly, the District shall pay Schlosser $395,000, less the amount the District has already paid Schlosser for CAB No. D-0905, plus interest as provided in the Schlosser-District settlement agreement.

**SO ORDERED.**

DATED: August 29, 2003

Jonathan D. Zischkau

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Matthew S. Watson

MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

Protests of:

| | | |
|---|---|---|
| Greater Washington Dental Services, Inc. | ) | |
| | ) | |
| Quality Plan Administrators, Inc. | ) | CAB Nos. P-0675 and P-677 |
| | ) | |
| Under Solicitation No. DCBE-2002-R-0047 | ) | |

For the Protesters: Greater Washington Dental Services, Inc., Kristen E. Ittig, Esq. and David P. Metzger, Esq., Holland and Knight, LLP; Quality Plan Administrators, Inc., Carol L. O'Reiordan, Esq. and Jonathan T. Williams, Esq., The O'Riordan Bethel Law Firm, LLP. For the Intervernor, Connecticut General Life Insurance Company, Thomas C. Papson, Esq. and Michael A. Hopkins, McKenna Long & Aldridge LLP. For the District of Columbia Government: Howard Schwartz, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Jonathan D. Zischkau concurring.

**OPINION**

*(Courtlink Filing ID 2591870)*

Greater Washington Dental Services, Inc. ("GWDS") and Quality Plan Administrators, Inc. ("QPA") protested award of a contract for dental insurance benefits for District of Columbia Government employees to Connecticut General Life Insurance Company ("CIGNA"). As the awardee, CIGNA intervened and has moved to dismiss the protest on the basis that neither GWDS nor QPA is properly qualified and licensed in the District of Columbia or the states of Maryland and Virginia to offer the services requested and therefore lack standing to protest as aggrieved parties entitled to award. The District supports the CIGNA position. Although the specifications regarding licensing are confusing and the District aggravated the confusion during negotiations, we conclude that the protests should be dismissed. The Board notes, however, that the requirement for licensing may have been inadvertently created by the District's drafting of specifications and that confusion as to required licenses was fostered by the District in negotiations with the protesters. In addition to the confusion created by the District as to licensing requirements, although the Board has not reached any decision on the merits of the protests, it appears that there is a substantial question as to whether the acceptance of a proposal whose benefits varied significantly from the specifications contained in the RFP was unfair to other offerors. The Board therefore recommends that the District not exercise any options to extend the contract after its first year and immediately begin reprocurement of the services to commence at the conclusion of the base period. The Board further recommends that the agency consult with the District of Columbia Insurance Commissioner as to licensing requirements.

## BACKGROUND

On August 19, 2002, the District issued RFP DCBE-2002-R-0047 (RFP), requesting proposals for a Dental Health Maintenance Organization (DHMO) plan[1] for District Government employees. (Agency Report ("AR"), Ex. 1). The District issued five amendments to the RFP including extending the closing date for offers to September 27, 2002. (*Id.*). Five offerors submitted proposals. (AR, Ex. 2). The Technical Evaluation Panel (TEP) conducted its initial evaluations between September 2002 and January 2003. (*Id.*). By letter dated April 3, 2003, the District notified all offerors that the District intended to conduct discussions, (AR, Ex. 2), and on April 11, 2003, the District requested best and final offers ("BAFO"), due April 17, 2003. (AR, Ex. 2). In April and May 2003, the TEP reviewed the BAFO proposals and developed consensus scores for each offeror. (AR, Exs. 3, 4 and 5).

In the Business Clearance Memorandum (BCM) dated May 22, 2003, the contracting officer reviewed the proposals and the TEP scoring, and made an independent assessment of the proposals. (AR, Ex. 2). In that independent assessment, the Contracting Officer concurred with the TEP's recommendation to award the contract to CIGNA. (AR, Ex. 2).

On July 7, 2003, the City Council approved the contract with CIGNA. (AR, Ex. 7). On July 8, 2003, the District awarded the contract to CIGNA and sent notice to the unsuccessful offerors. (AR, Ex. 6). On July 14, 2003, the District debriefed GWDS and QPA and on July 21 and July 24, 2003, respectively, QPA and GWDS filed timely protests with the Board. Both protests were supplemented on August 4, 2003.

## DISCUSSION

Although previous contracts provided similar dental benefits to District employees as the subject contract, this solicitation represented a significant change in the nature of the services and the division of risk between the District and the contractor.

> [Prior procurements] . . . have been awarded on an "Administrative Services Only" basis. As such, they were structured so that the District retained exclusive responsibility for compensating service providers (e.g., dentists) for services (exclusive of the participant's co-payment obligations). In such cases, the administrator acts merely as a conduit for the District's transfer of funds in payment to the providers, and the administrator bears no responsibility for payment of the providers.
>
> . . . The subject procurement did not contemplate award on an Administrative Services Only basis, but rather award on a "fully insured basis". That term as regularly used within the plan administration

[1] The initial solicitation also requested proposals for a Dental Preferred Provider Plan (DPPO), which was subsequently deleted. (AR, Ex 1 - Amendment 4, March 27, 2003).

> industry, refers to an award in which the plan administrator contracts to assume any and all costs of service, apart from required co-payments and deductions, associated with the performance of that plan, "insuring" the plan's sponsor (in the instant procurement, the District of Columbia) against the need to fund such costs of service.

(Affidavit of Milton D. Bernard, DDS, President of Protester QPA, QPA Opposition to Motion to Dismiss, Ex. A).

This understanding is consistent with the Contracting Officer's response to potential offerors' questions.

> QUESTION 4: Would your organization consider a response for a dental program on an "Administrative Services Only" (ASO) basis?
>
> RESPONSE: No, the District requests that all offerors submit a proposal based on a fully insured plan.
>
> * * *
>
> QUESTION 10: What funding type are you proposing that we quote (fully insured-participating or non-participating or ASO)?
>
> RESPONSE: We are requesting you offer a non-participating fully insured plan.

(AR, Ex. 1 - Amendment 001, August 29, 2002).

Insurance is a highly regulated industry. Although the basic nature of the plan changed from an "Administrative Services Only" to a fully insured plan, the District does not appear to have considered the licensing implications. Further, the District was not sufficiently forthcoming in responding to potential offerors' questions as to licensure requirements. When specifically asked in Question 32B (Amendment 002); to state licensure requirements and specifically requested to give "an elaborated response . . . with appropriate jurisdiction and code references, and a discussion of any authority of the District to waive requirements," the Contracting Officer generically responded that "All providers of service must be licensed in accordance with the jurisdictions that govern their practice." (*Id.*).

The confusion as to required licenses was compounded during negotiations. The misunderstanding by the offerors should have been apparent to the District when the documentation supporting the proposals was reviewed. In the process of negotiation, each of the proposers was requested in written questions to "provide evidence of regulatory approval of your proposed plan in DC, MD and VA. (Motion to Dismiss, Ex. A). The intervenor and the two protesters each submitted totally different licenses alleged to support their authority to offer their dental plans.

CIGNA submitted licenses from the insurance departments of all three jurisdictions.[2] (*Id.*). GWDS is not licensed by the insurance department of any jurisdiction. GWDS submitted only general corporate certificates of authority from all three jurisdictions. (*Id.*, Ex. 2). QPA submitted a Maryland Insurance Administration license, not as an insurer, but rather as a third party administrator and statements from the District and Virginia insurance departments that third party administrators were not licensed in their jurisdictions. (*Id.*, Ex. 3).

Notwithstanding that the District had specifically stated that "a response for a dental program on an "Administrative Services Only" (ASO) basis" was unacceptable, the Business Clearance Memorandum found without explanation that submission of an Administrator's license was satisfactory evidence of regulatory approval. (AR, Ex. 2, p. 6). The BAFO evaluation identically rated CIGNA, GWDS, and QPA as fully meeting Evaluation Subfactor "M.4.1.1.3, "Offeror had received regulatory approval from District of Columbia, Maryland and Virginia" even though between the three companies, no two licenses submitted as documentation of qualification were the same.

Although award was apparently made without consideration of compliance with insurance laws, and companies not licensed as insurance companies were evaluated as fully acceptable, the District has belatedly come to the conclusion that licensure as an insurance company is required for award. (District Response to Motion to Dismiss, 4). Protester QPA argues that that is not the case. In responding to the motion to dismiss QPA states:

> Nothing in the Solicitation or in the District of Columbia's governing authority accords the term "fully insured plan" a meaning different than the standard definition recognized within the plan administration industry. See Third Affidavit of M. Bernard, ¶ 4 (attached as Exhibit A hereto); Third Affidavit of A. Davidson, ¶ 4 (attached as Exhibit B hereto). Indeed, there is no mention of the term in any relevant authority or any suggestion that the term as utilized in the Solicitation should be accorded the novel meaning that CIGNA now seeks to attribute to it, and by which CIGNA would bootstrap independent (and irrelevant) insurance licensing requirements that are nowhere mentioned in the Solicitation as issued or amended.
>
> No special regulatory approval is needed for a "fully insured plan" because that term defines the way in which costs and risks are apportioned between the contractor/administrator and the plan sponsor, and not the type of entity eligible to perform the contract. The District's plan as expressed in the RFP anticipates that the participants will pay for services rendered through co-payments established by the contract as awarded, and that the District's only financial obligation will be to pay the contractor a fee on a capitated basis (calculated per plan participant). In turn, the

[2] CIGNA is licensed as a "Limited Health Maintenance Organization" in Virginia and as an insurance company in the District and Maryland.

> contractor will ensure that a network of providers is assembled and available to provide the services, will enter into independent contracts with the providers and will assume all risk of payment to the providers for services, relieving the District of the risk that it has borne under some prior plans.

(QPA Opposition to Motion to Dismiss, 3-5).

In the absence of a specialized definition or any evidence that something other than the term's ordinary meaning was intended, it is appropriate to view a solicitation or contract term in accordance with its plain and ordinary meaning. Restatement (Second) Contracts § 202(3); *George Hyman Constr. Co. v. United States*, 832 F.2d 574 (Fed. Cir. 1987). The plain and ordinary meaning of insurance is the transfer of risk from a person or entity, which has a potential obligation to another entity, which agrees to assume that obligation. *See Black's Law Dictionary* (7th ed. 1999), "insurance". Protester admits that that is exactly what was intended in the solicitation by stating that the contractor "will assume all risk of payment to the providers for services, relieving the District of the risk that it has borne under some prior plans." Entities offering insurance are required to be licensed by the respective insurance departments in all three jurisdictions. (*See e.g.* Code of Virginia, Title 38.2, Insurance, Chapter 43, Health Maintenance Organizations).

The Maryland law makes the licensure clearest with regard to dental plans. Title 14 of the Maryland Insurance Code is entitled "Entities Which Act as Health Insurers" and includes subtitle (4) captioned "Dental Plan Organization Act." For purposes of that subtitle "Dental plan organization" means a person that provides directly, arranges for, or administers a dental plan on a prepaid or postpaid individual or group capitation basis. (§14-401(c)). Unless otherwise authorized by statute to perform dental services, (§14-401), "[a] person may not establish, operate, or administer a dental plan organization or sell, offer to sell, solicit offers to purchase, or receive advance or periodic consideration in conjunction with a dental plan, unless the person has a certificate of authority issued by the Commissioner under this subtitle." (§14-403).

Notwithstanding the fact that neither the solicitation nor the discussions made the licensing requirements clear, (see GWDS Opposition to Motion to Dismiss, 2), the Board agrees with CIGNA and the District that, as a matter of insurance law, a dental insurance plan must be licensed by state insurance departments as an insurer or as a dental health plan. QPA asserts that it could perform the required services pursuant to its license as a Third party administrator. Acting as a Third party administrator would conflict with the insured plan contemplated by the solicitation. The solicitation provided that the only obligation of the District is to pay a fixed amount per covered employee per month. The District has no obligation to pay excess costs if the contractor's costs for covered dental service exceed the contractor's revenue and, conversely, the District has no entitlement to a refund if the contractor's costs are less than its revenue. Upon receipt, payments by the District to the contractor are the property of the contractor, which it may commingle with its own funds and use as it pleases. Such a relationship is inconsistent with the role of a Third party administrator. The Maryland Insurance Code, for example, provides in § 8-

316 entitled "Prohibited activities of administrator" that . . . "[w]ith respect to a plan, an administrator, directly or indirectly . . . may not deal with the assets of the plan in the administrator's own interest or for the administrator's own account."

Whether or not the District initially understood that an insurance carrier license was required, the insurance law of the three jurisdictions requires licensing in order to perform as required by the contract terms. Since licensing is a mandatory legal requirement to perform the contract, it is by definition a definitive standard of responsibility since it must be a precondition for award[3] and a requirement for a prospective contractor to be able to perform the contract. See *M.C. Dean, Inc.*, CAB No. P-505, Dec. 3, 1997, 45 D.C. Reg. 8664. Evidence that a prospective contractor meets a definitive standard of responsibility may be required before award. The District requested documentation from all offerors as to their licensure. Neither QPA nor GWDS showed the legally required licenses in the three jurisdictions and thus were not eligible for award. The Board has consistently held that only offerors or potential offerors that can receive award have standing to protest. See, *e.g., MTI-Recyc, a Joint Venture,* CAB No. P-287, Oct. 1, 1992, 40 D.C. Reg. 4554. Since we find that neither QPA nor GWDS possessed licenses necessary for award we dismiss their protests for lack of standing.

## RECOMMENDATION

While the Board dismisses the protests, the Board believes that there were problems in the procurement and award that impeded full and fair competition. As noted above, the District itself was confused as to the required licensure. Although qualified insurance providers should be expected to understand the regulatory environment, the District's failure to give guidance when requested and erroneous approval of unacceptable documentation as being fully compliant could certainly have improperly led the protesters to believe that they had made acceptable offers.

In addition, the District did not make clear that it would consider offers that differed radically from the two specified plans included in the solicitation. Although the solicitation did state offerors could deviate from the plans specified in the solicitation, it is not unreasonable to read the solicitation as a whole as permitting only minor deviations and not a totally different plan. Section C.3 stated that "[t]he plans shall *identically* match the proposed . . . programs designs and benefits as stated in Section C.5. [emphasis supplied]" The section went on to state that it is only where the offeror is "unable" to match the prototype plans that it may propose deviations. There is no indication that CIGNA was "unable" to offer the stated plan benefits, only that for business reasons it chose not to do so. In its answer to questions, the District did not make clear that it would accept major deviations. In fact, the District implied the opposite. In the answer to question 3 in Amendment 3 it was specifically stated that "[t]he District will choose one of the two plans based on its evaluation of the associated costs. (AR, Ex. 1). It is

[3] Indeed, it could be argued that a Certificate of Authority from the Maryland Insurance Commissioner is required prior to bidding. Maryland Insurance Code §14-403 requires that "a person may not offer to sell . . . a dental plan, unless the person has a certificate of authority issued by the Commissioner under this subtitle."

alleged that the CIGNA plan that was accepted is substantially different from either plan 1 or plan 2. It would therefore appear from the solicitation that, prior to selecting CIGNA, the District should have revised the solicitation. Section L.2.5 entitled Plan Deviations stated:

> Proposals shall be based on the specifications of Section C of the solicitation. Exceptions to any part of this solicitation should be stated separately in Attachment J.9. Any exceptions, if accepted, would constitute a change in the scope of the work and an amendment would be issued. Each Offeror would be asked to submit a revised proposal.

No amendment was ever issued to encompass CIGNA's deviations and no revised proposals were requested. In light the confusion as to licensing requirements and the failure to follow the procedures outlined in the solicitation, the Board recommends that the District not exercise the options contained in the protested contract and immediately institute a new procurement so that a new contract can be in place at the expiration of the initial term of this contract. The Board further recommends that to avoid the regulatory confusion in formulating the new procurement that the agency request the assistance of the Department of Insurance and Securities Regulation.

**SO ORDERED.**

DATED: October 22, 2003

*/s/ Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

CONCURRING:

*/s/ Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA

**CONTRACT OF APPEALS BOARD**

APPEAL OF:

| | | |
|---|---|---|
| PRINCE CONSTRUCTION COMPANY, INC. | ) | |
| | ) | CAB No. D-1011 |
| Under Contract Nos. 93-0037-AA-2-0-KA | ) | (Quick Payment Act) |
| 94-0065-AA-2-0-CC | ) | |

For the Appellant: Robert Klimek, Esq., Klimek, Kolodney & Casale, P.C. For the Government: Jack Simmons, III, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

**OPINION**

*(Courtlink Filing ID 2668212)*

This is the second request for reconsideration of this matter. In an opinion dated February 25, 2002, the Board granted summary judgment for quick payment act interest to Appellant. (50 D.C. Reg. 7400). Upon motion of the District to reconsider that judgment, the Board vacated its judgment and dismissed the action. (July, 15, 2003, 50 D.C. Reg. 7518). The matter is now before the Board on the motion of the Appellant to reconsider the dismissal. Upon consideration of the instant motion and the response of the District, the Board finds no basis to reconsider the dismissal. The Appellant's Motion for Reconsideration is denied.

**BACKGROUND**

As noted in the Board's July 15, 2003 opinion, (*Id.*), in addition to the instant action, claims involving the contracts now before the Board were previously heard by the Superior Court. The Superior Court action was concluded by a consent judgment. As opposed to a voluntary dismissal in which the court makes no determination as to facts, in a consent judgment, just as in any other judgment, the court makes an affirmative determination of the facts and law in the case. The judgment of the court, including a consent judgment, establishes the facts, and may be enforced in its own right without further proof of the underlying cause. The Board, pursuant to the "law of the case" doctrine, is required to give deference to the Superior Court's determinations.

The Court of Appeals recently discussed the "law of the case" doctrine stating:

> "The 'law of the case' doctrine bars a trial court from reconsidering the same question of law that was presented to and decided by another [judge] of coordinate jurisdiction . . . ." *Tompkins v. Washington Hospital Center*,

> 433 A.2d 1093, 1098 (D.C. 1981). "The analysis focuses on whether the question initially decided is substantially the same as the issue being presented and whether the court's first ruling was deemed to be final." *Gordon v. Raven Systems & Research, Inc.*, 462 A.2d 10, 12 (D.C. 1983) (citing Tompkins). The doctrine applies "when (1) the motion under consideration is substantially similar to the one already raised before, and considered by, the first court; (2) the first court's ruling is sufficiently final; and (3) the prior ruling is not clearly erroneous in light of newly presented facts or a change in substantive law." *P.P.P. Productions, Inc. v. W & L, Inc.*, 418 A.2d 151, 152 (D.C. 1980) (citation and internal quotation marks omitted).

*Pannell v. District of Columbia,* 829 A.2d 474, 477-8 (D.C. 2003).

Appellant supports the instant motion for reconsideration by a recitation of facts supporting its position that the payment made in settlement of the Superior Court action was payment of a contract claim and not an equitable claim of unjust enrichment. The facts now alleged by appellant were all available at the time the Superior Court entered its judgment. We found in our previous order dismissing the matter that the joint memorandum in support of the consent judgment which was adopted in the court's final judgment clearly based the award on equitable, rather than contract grounds. This is the same question of law as is now before the Board. Regardless of whether the Board might itself come to a different opinion as to whether the payments were contractual or equitable, the determination adopted by the Superior Court is not clearly erroneous. The Board may not relitigate a factual matter already adopted by the parties and reduced to a consent judgment of the Superior Court. The Board is therefore bound to follow the Superior Court determination in this matter that the payment was based on equity, not contract. Interest is not authorized on an equitable payment. Appellant's Motion for Reconsideration must therefore be denied.

**SO ORDERED**

November 7, 2003

Matthew S Watson
/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

CONCURRING:

Jonathan D. Zischkau
/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA

# CONTRACT APPEALS BOARD

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| APPEAL OF: | ) | |
| | ) | |
| FORT MYER CONSTRUCTION COMPANY | ) | CAB No. D-1223 |
| | ) | |
| Debarment dated July 8, 2003 | ) | |

For the Appellant: Joe R. Caldwell, Esq., O. Kevin Vincent, Esq. and Hollie Mathis, Esq., Baker Botts, L.L.P. For the Government: Thomas J. Foltz, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

## OPINION GRANTING SUMMARY JUDGMENT TO INDIVIDUAL APPELLANTS JOSE RODREGUEZ AND LEWIS F. SHRENSKY

*(Courtlink Filing ID 2810585)*

This matter is an appeal from a final debarment decision of the Chief Procurement Officer ("CPO") dated July 8, 2003. (Appellees Opposition, Ex. 12-C). The decision, although addressed solely to Fort Myer Construction Corporation ("Fort Myer"), stated that the company and its principals, "Mr. Rodriquez and Mr. Shrensky,... individually...," together with "its affiliates," were debarred for a period of three years. (*Id.*, 5-6). Fort Myer, in its corporate capacity, and Mr. Rodriquez and Mr. Shrensky (collectively "individual appellants"), individually, joined in a timely appeal from the final decision. Appellants have jointly moved for summary judgment. The issues raised in this appeal by Fort Myer and the individual appellants are different. The Board will therefore consider the debarments in separate opinions. This opinion considers the debarment of the individual appellants.

The Board agrees with the individual appellants that, pursuant to D.C. Code § 2-308.04(a)(1), a debarment must be preceded by a formal notice given separately to each party who may ultimately be debarred. Since it is undisputed that no notice of proposed debarment conforming to the regulations implementing the debarment statute was given to the individual appellants, the Board finds that the purported debarments of Mr. Rodreguiz and Mr. Shrensky included in the final decision dated July 8, 2003, are void *ab initio* and are of no effect.

## FACTS

By letter dated April 25, 2003, the Agency Chief Contracting Officer of the District's Department of Transportation, acting on behalf of the CPO, gave notice to Fort Myer that the CPO proposed to debar Fort Myer from consideration for award of District contracts and subcontracts. (Memorandum in Support of Motion for Summary Judgment, Ex. B) ("Notice"). The Notice was sent by certified mail, return receipt requested, addressed to Lewis F. Shrensky, as Executive Vice President of Fort Myer. (*Id.*, 1). The Notice stated that "[t]he CPO is proposing the debarment of Fort Myer for conviction for bribery and for submitting false tickets to facilitate payment for asphalt materials not provided to the District" and specifically advised that "[t]his letter serves as notice of the proposed debarment action *against Fort Myer*." (*Id.*, 3) (emphasis supplied). Although the notice to Fort Myer referenced the statutory provision dealing with the possible extension of the debarment to affiliates of Fort Myer[1], no notice was specifically directed to the individual appellants or any other possible affiliates of Fort Myer.

## DISCUSSION

The authority of the CPO to debar corporations or individuals from doing business with the District is granted by D.C. Code § 2-301.04, which specifically conditions the authority upon the CPO's giving "reasonable notice to a person or business" proposed to be debarred. The form and manner in which that notice is to be given is provided by published regulations. The District's debarment regulations dealing with notice of a proposed debarment are quite clear. 27 DCMR § 2213.3 provides that:

> The [CPO] may extend the debarment decision to include any affiliates of the contractor *by specifically naming the affiliate and giving the affiliate written notice of the proposed debarment* and an opportunity to respond in accordance with the provisions of this chapter. [emphasis supplied]

27 DCMR §2214.1 further provides that:

> The {CPO] shall initiate debarment proceedings by notifying the contractor *and any specifically named affiliates* by certified mail, return receipt requested . . . . [emphasis supplied]

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[1] The notice stated:

> According to D.C. Official Code §2-308.04(f), the debarment or suspension of any person or business shall constitute a debarment or suspension of any affiliate of that person or business. Affiliate means any business in which a suspended or debarred person is an officer or has a substantial financial interest (as defined by regulations), and any business that has a substantial direct or indirect ownership interest (as defined by regulations), in the suspended or debarred business, or in which the suspended or debarred business has a substantial direct or indirect ownership interest.

The notice, did not, however, advise affiliates of any right to respond. The notice, without acknowledging any rights of affiliated persons, stated:

> "[w]ithin thirty business days after receipt of this notice, Fort Myer must submit, in person or in writing, or through a representative, in formation addressing the aforementioned issues raised regarding this matter . . . . [as well as] additional specific information that raises a genuine issue of material fact

Principals of a corporation which is debarred are themselves subject to debarment as "affiliates" of the debarred business. An "affiliate" is defined in the procurement regulations as "[a]n individual or firm that controls, is controlled by, or is under common control with another individual or firm." (27 DCMR §2299). The individual appellants, as the owners and operating officers of Fort Myer, are clearly affiliates of Fort Myer as defined in the regulations.[2]

"It . . . [is] axiomatic that an agency is bound by its own regulations. The fact that a regulation as written does not provide [the agency] a quick way to reach a desired result does not authorize it to ignore the regulation." *Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission,* 613 F.2d 1120, 1135 (DC Cir. 1979), *cert. denied*, 449 U.S. 889 (1980); *see also, Dankman v. District of Columbia Board of Elections and Ethics*, 443 A.2d 507, 513 (D.C. 1981).

Notwithstanding that the individual appellants were specifically named in the final decision, the District does not dispute that the only notice of the proposed debarment was directed to Fort Myer and that no formal notice, as required by the regulations, was given to the individual appellants. Although the District advised Fort Myer in general terms that its debarment might be extended to its affiliates, and although the individual appellants were clearly aware of the proceeding against Fort Myer and should have understood that their individual status as government contractors was at risk if the corporation was debarred, the regulations are quite clear that a specific form of written notice sent by "certified mail, return receipt requested" is essential to give the CPO authority to initiate their debarment.[3] It is not incumbent upon the individuals who may be at risk of debarment to guess when they should intervene in the proceeding. The regulations, as well as procedural due process, require that the CPO give separate notice delivered by certified mail, return receipt requested, to each individual person or business which may be debarred in the proceeding.[4]

In addition to fundamental fairness, there are good reasons underlying the regulatory requirements that affiliates be separately notified of any proposed debarment and the alleged grounds supporting it. Even though the individuals and entities may be related, the interests and procedural rights of the corporation and its affiliates are not necessarily identical. As in this matter with regard to Fort Myer, in a debarment based on a criminal conviction, the CPO need

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[2] The individual appellants in the instant matter were specifically named in the final decision. However, the District has also asserted that other businesses alleged to be affiliates of Fort Myer, but not named in the final decision, were also automatically debarred by the decision which is the subject of this appeal. See *F M C Civil Construction, L.L.C.*, CAB No. D-1218 (dismissed as moot pursuant to the Debarment Procedures Emergency Amendment Act of 2003, (DC Act 1-153)).

[3] The Court of Appeals has similarly required strict compliance with mailing requirements, regardless of actual knowledge, in analogous areas where the individuals are deprived of property rights, such as sales of property for delinquent taxes. In *Associated Estates, LLC v. Caldwell*, 779 A.2d 939 (D.C. 2001), the Court concluded "that even though there exists a genuine factual dispute over whether Ms. Caldwell received actual notice of the expiring redemption period, that dispute was not material to the summary judgment motion before the trial court. The District's undisputed failure to furnish notice by registered or certified mail, as required by law, required the trial court to grant Ms. Caldwell's motion and void the tax deed issued to Associated Estates." 779 A.2d at 945.

[4] The Board believes that the notice regulations are equally applicable to proceedings of the Debarment and Suspension Panel established by the Debarment Procedures Emergency Amendment Act of 2003, (D.C. Act 1-153)).

not conduct a hearing, but may make a decision on the administrative record. The conviction itself is cause for debarment. 27 DCMR § 2214.1(c). On the other hand, if the cause for debarment is not a criminal conviction, the entity proposed to be debarred is entitled to a trial-type hearing, *Id.* § 2214.2, and cause must be proved by a preponderance of the evidence. *Id.* § 2214.3.

The cause for debarment of Fort Myer itself was its undisputed conviction of a crime involving a District procurement. The cause relied upon for debarment of the individuals, however, could not have been criminal convictions, since only the corporation, not these individuals, were charged and convicted. Rather, the debarment of the individuals is based upon their affiliation with Fort Myer. While Fort Myer was not entitled to a trial-type hearing, arguably the principals were. Nevertheless, by the single notice and proceeding against the corporation, the CPO denied the individuals their right to a trial-type hearing. The notice stated that "[s]ince the proposed debarment is based upon a conviction and the [opportunity to respond in person] is granted pursuant to 27 DCMR 2214.1(c), the [trial-type] procedures of 27 DCMR 2214.2 are not applicable." Fort Myer Reply, Ex. A (letter dated May 19, 2003 from CPO to Shrensky). Had specific notice of proposed debarment been given to Mr. Rodriguez and Mr. Shransky, the District would have to have stated other grounds for their proposed debarment, such as their affiliation with Fort Myer, and afforded them a more formal hearing.

Since no specific written notice of proposed debarment was sent by certified mail, return receipt requested, to either of the individual appellants, their purported debarment violated the unambiguous regulations establishing debarment notice procedures. Therefore, the Board finds that the CPO had no authority to debar the individual appellants and the purported debarments of Jose Rodriguiz or Lewis Shrensky are void *ab initio* and of no effect.

**SO ORDERED.**

December 9, 2003

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

CONCURRING:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA

# CONTRACT APPEALS BOARD

| | | |
|---|---|---|
| APPEAL OF: | ) | |
| | ) | |
| FORT MYER CONSTRUCTION COMPANY | ) | CAB No. D-1223 |
| | ) | |
| Debarment dated July 8, 2003 | ) | |

For the Appellant: Joe R. Caldwell, Esq., O. Kevin Vincent, Esq. and Hollie Mathis, Esq., Baker Botts, L.L.P. For the Government: Thomas J. Foltz, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

## OPINION VACATING AND REMANDING DEBARMENT OF FORT MYER CONSTRUCTION COMPANY

*(Courtlink Filing ID 2977610)*

This matter is an appeal from a final decision of the Chief Procurement Officer ("CPO") dated July 8, 2003, debarring Fort Myer Construction Company ("Fort Myer").[1] The CPO instituted the debarment proceeding and based his debarment decision solely on the conviction of Fort Myer for conspiracy to commit bribery of District inspectors. Fort Myer has moved for summary judgment. Fort Myer argues that the debarment decision was not based on its present responsibility. (Motion 3-4). The District opposes the motion for summary judgment on the grounds that there are genuine issues of material fact making summary judgment inappropriate. (Opposition 4). The District further argues that debarment is justified by unethical activities of affiliates of Fort Myer. (*Id.*, 12). The Board is limited to consideration of the grounds upon which the debarment was instituted.

While an individual's conviction for a crime may be sufficient on its own to justify the individual's debarment, debarment of a corporation must be founded on a determination of actual nonresponsibility and not based *solely* on the corporation's criminal conviction. "The ultimate inquiry as to 'present responsibility' relates directly to the contractor itself, not to the agent or former agent personally responsible for its past misdeeds." *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989). Such corporate culpability need not rise to the level of criminal liability, but must be such that one can find the corporation currently nonresponsible.

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[1] The decision purported debar Fort Myer Construction Corporation and its principals, "Mr. Rodriguez and Mr. Shrensky, individually...," together with "its affiliates," (*Id.*, 5-6). Fort Myer, in its corporate capacity, and Mr. Rodriguez and Mr. Shrensky (collectively "individual appellants"), individually, joined in a timely appeal from the final decision. Appellants have jointly moved for summary judgment. The issues raised by Fort Myer and the individual appellants are different. The Board therefore determined to consider the debarments in separate opinions. By our opinion dated December 9, 2003, we found the debarments of Mr. Rodriguez and Mr. Shrensky void *ab initio.*

Because of an unresolved criminal proceeding against a former employee of Fort Myer, a number of witnesses and Federal investigators could not cooperate with the CPO prior to the CPO's debarment decision. As a result, the CPO was forced to rely solely on Fort Myer's conviction and could not adequately consider facts underlying the conspiracy which might bear on Fort Myer's present responsibility. The pending criminal proceeding has now been completed and some witnesses have been contacted by the District. In this proceeding, the Board requested that the District proffer evidence as to the relation of current Fort Myer principals or employees to the criminal conduct. The Board is not convinced that the hearsay and other indirect evidence proffered by the District supports a finding of nonresponsibility of the corporation. While the new information may lead to evidence which would support debarment, this information has not been considered and investigated by the CPO. The appropriate debarment officials should consider the new information, as well as the additional grounds recently proffered by the District, before it is raised to the Board. Accordingly, we vacate the debarment of Fort Myer Construction Company and remand the matter to the CPO for the CPO (or the Debarment Committee created by Debarment Procedures Emergency Amendment Act of 2003, (DC Act 1-153)) to consider whether the evidence which has become available since the CPO's decision supports debarment of Fort Myer consistent with the principles stated in this decision.[2]

## FACTS

On March 10, 2003, Fort Myer pled guilty to having participated in a conspiracy to bribe District inspectors between 1995 and March 1998. As part of its plea agreement, Fort Myer agreed to a "Statement of Offense" prepared by the United States Attorney describing the evidence the government believes it could prove regarding Fort Myer's actions and involvement in the conspiracy. (Opposition, Ex. 1). The statement constitutes an admission of facts by the Appellant upon which the CPO and the Board may rely. The Statement of Offense does not admit that Fort Myer provided the funds used to bribe the inspectors or admit to any management failures which permitted the illegal scheme to proceed and identifies only one Fort Myer employee, Antonio Bras, as a participant in the illegal acts. Mr. Bras, who has recently been convicted of bribery of a District official, is no longer associated with Fort Myer and has not been employed by Fort Myer since his indictment. (*Id.*)

The District submitted the United States District Court filings in the prosecution of Mr. Bras. (Opposition, Ex. 2). The file does not name any other Fort Myer employee as a participant in the criminal activity, nor does it identify the source of the funds used in the bribery scheme or detail any management acquiescence which permitted his illegal acts. Mr. Bras went to trial on December 4, 2003. Mr. Bras pled guilty after the presentation of the Government's case. Although a transcript of prosecution testimony is not available, an investigator from the Office of the Corporation Counsel ("OCC") was present at the trial. The District has submitted the investigator's affidavit. (Affidavit dated December 10, 2003). The affidavit does not reflect that any current Fort Myer employee was mentioned in testimony at the trial as participating in the criminal activity.

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[2] The regulations contemplate that debarment proceedings may be reopened at the request of the contractor to receive "newly discovered material evidence." (27 D.C.M.R. §2213). The CPO inherently has the authority to similarly reconsider debarment based on previously unavailable evidence.

After the trial, the OCC investigator interviewed three Government witnesses from the trial and reported on the interviews in an affidavit filed in this matter.[3] Two of the witnesses interviewed were DPW inspectors awaiting sentencing for their own criminal conduct, and the third was a former Fort Myer employee.

The affidavit indicates that one former DPW witness related that "on one occasion during the course of the bribery scheme, Anthony Bras informed [the DPW inspector] that he [Bras] would not be able to pay [the inspector] for about a month. [The inspector] informed [the investigator] that Bras told [the inspector] at the time that he [Bras] could not get any money because Joe Rodriguez was out of the country for about a month. [The inspector] informed [the investigator] that [the inspector] continued to accept fraudulent tickets and certify that asphalt was being delivered and Bras eventually paid him." (Affidavit, ¶ 6).

The second former inspector related a similar incident without referring to Mr. Rodriguez. "[O]n one occasion, during the bribery scheme, Tony Bras told [the second inspector] that he [Bras] did not have money to pay [the inspector] at that time. [The second inspector] informed [the investigator] that Bras told [the second inspector] to call [a Fort Myer asphalt superintendent] for the money." The second inspector then related how "[the second inspector] accompanied the superintendent to the bank and received the money [from the Fort Myer superintendent]." (Affidavit, ¶ 7). There is no indication in the record whether the superintendent is still associated with Fort Myer. Further, there is no indication as to the source of the funds for the alleged payment.

The affidavit further indicated that the former Fort Myer employee interviewed by the investigator "informed [the investigator] that Jose Rodriguez was personally involved in directing that fraudulent tickets be created. [The former employee] stated that on several occasions Tom Knight [a Fort Myer dispatcher now deceased] received telephone calls directly from Jose Rodriguez during which Rodriguez would order Knight to create a certain number of fraudulent tickets. [The former employee] stated that he was present when Knight received these calls from Jose Rodriguez and that as a result he [the former employee of Fort Myer] created the desired number of tickets." (Affidavit, ¶12).

In addition to the affidavits, the District submitted over 40 exhibits to support the debarment. Except for Exhibits 1 (court filings in the criminal case against Fort Myer, DDC Cr. No. 02-081) and 2 (court filings in the criminal case against Antonio Bras, DDC Cr. No. 03-051), the exhibits are neither relevant to the conviction of Fort Myer nor shed light on the involvement of current Fort Myer employees in the conspiracy. Exhibits 3 through 5 relate to conviction of other contractors. Although the individuals may be related by blood or marriage to the Fort Myer principals, these exhibits only show similar unlawful schemes of other contractors. Exhibits 6 through 11 are filings in criminal matters concerning corrupt District inspectors.

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[3] The District also submitted unsworn "talking points" sent by the FBI. The Board finds this document of no evidentiary value. In addition to the fact that the document is unsworn and its author's position with the FBI unidentified, the points appear, on their face, to be unreliable. The debarment is based on a conviction of a conspiracy concerning fraudulent claims to the District for nonexistent asphalt. The talking points are summarized stating "In general: a number of the inspector's [*sic*] and project engineers worked deals with Mario deSousa to inflate *concrete* in exchange for cash." Of the 10 talking points: 2 deal specifically with concrete, "not for asphalt;" 2 involve the contracts with Virginia, not the District; and 1 describes Rodriguez as sending trucks to be loaded and then taken to dumps, which is not alleged anywhere else in the extensive record.

With the exception of Exhibit 7, no employees of Fort Myer are named. Exhibit 7 comprises the criminal case filings against a District inspector involved in a different corrupt scheme. The United States' Rule 11 Proffer in this matter names a Fort Myer employee as a participant in an unlawful scheme for which Fort Myer was neither charged nor convicted.[4] No evidence was proffered that the named employee is still employed by Fort Myer. Exhibits 11A through 19, with the exception of Exhibits 12-C and D and 13-A, are a potpourri of allegations or implications of questionable conduct by Fort Myer such as alleged OSHA (Ex.18-F) and immigration violations, (Ex. 18-G) which, although they may be grounds for a determination of nonresponsibility, were not noticed as grounds for the proposed debarment and not considered by the CPO in his July 8, 2003, debarment decision.[5]

Exhibits 21 and 22 are affidavits of the Corporation Counsel investigator stating the content of an earlier interview with another former employee of Fort Myer who had left Fort Myer prior to the conspiracy for which Fort Myer was convicted. In an interview on October 6, 2003, the former employee stated "Jose Rodriguez and Lewis Schrensky [the Fort Myer principals] 'micromanaged' every aspect of [Fort Myer] and [District Paving]. [The former employee] stated that [Rodriguez and Schrensky] "watched every nickel" in the way of expenditures and that if [District Paving] employees were paying bribes to DCDPW employees they would be reimbursed by [Fort Myer] management and as a result both Jose Rodriquez and Lewis Schransky would be aware of these activities." (Ex. 21).

## DISCUSSION

D.C. Code § 2-309.03 grants the Board general jurisdiction to review District procurement actions. The jurisdiction to review debarment decisions is further specified by D.C. Code § 2-308.04(d) which provides:

> A copy of the [debarment] decision pursuant to subsection (c) of this section shall be final and conclusive unless fraudulent, or unless the debarred or suspended business appeals to the Contract Appeals Board within 60 days of receipt of the CPO's decision by the business.

Although the Board's jurisdiction to review and determine appeals is *de novo,* a debarment must be initiated by a "notice" (D.C. Code § 2-308.04(a)(1)), setting forth "[t]he reasons for the proposed debarment in sufficient detail to put the contractor on notice of the conduct or transaction(s) upon which the proposed debarment is based." 27 D.C.M.R. § 2214.1. Due process, the District statute authorizing debarments, and the implementing regulations, all mandate that the debarment official's determination and the Board's review of a debarment action be limited to the cause or causes for which notice was given.

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[4] The bulk of this filing dealt with the failure of a succession of DPW directors and other senior DPW personnel to adequately investigate the criminal allegations when they were first raised and "[a]t the very least, [the senior official of the Street Construction Branch] just simply appeared to be incapable of dealing with his subordinates at the agency." *U.S. v. Hagatalab*, Government's Rule 11 Proffer at 5

[5] Exhibits 20-A and B are records of the assessed valuations of the residences of the principals of Fort Myer from which the District appears to infer that ownership of expensive property is indicative of fraudulent conduct. The Board sees absolutely no relevance of these documents to the debarment and finds them inappropriate. Without foundation, their submission is an appeal to irrational prejudice.

The notice of proposed debarment in the instant matter stated that "[t]he CPO is proposing the debarment of Fort Myer for conviction of bribery[6] and for submitting false tickets to facilitate payment for asphalt materials not provided to the District." (Motion, Ex. B). The basis of the proposed debarment was confirmed in a letter from the CPO to Fort Myer dated May 19, 2003, which stated, "the proposed debarment is based upon a conviction." (*Id.* Ex. A). No debarment of Fort Myer has been initiated for any other cause. This Board, on appeal, is therefore constrained to consider only whether the cause or causes stated in the initial notice are supported. The Board will therefore not consider allegations of impropriety other than that for which Fort Myer was convicted or consider the suggestion by the District that Fort Myer may properly be debarred because of common control "through interlocking management or ownership, identity of interests among family members, shared facilities and equipment, [and] employees . . . or similar management, ownership or principal employees" of another suspended or debarred entity. (Opposition, 12).

The proceedings to debar Fort Myer were previously before the Board in a separate appeal at an earlier stage of the debarment process. In denying a challenge to the initial suspension of Fort Myer, we held that "[a] cause for debarment, the guilty plea, has clearly been established. The final decision as to debarment, however, must consider the Appellant's present responsibility and a finding [as to] the public interest, including the interest of doing business with participants who are presently responsible." (CAB No. D-1206, Opinion at 7). To debar a contractor based on a criminal conviction, the CPO must show some relevance, or nexus, of the conviction to the current responsibility of the corporation proposed to be debarred.

A corporation is not capable of acting independently, but can act only though its owners, employees and other agents. Thus, a corporation's criminal liability derives from criminal actions of its agents. The criminal culpability of a corporation is based on the culpability of the agents of the corporation *at the time the crime was committed. See Commonwealth v. Beneficial Finance Co.*, 275 NE2d 33 (Mass.), *cert. denied*, 407 US 910, 914 (1971). Thus, terminating the culpable agent upon discovery of the illegal action does not diminish corporate criminal responsibility for a crime which has already occurred. Debarment, however, is based on the responsibility of a contractor *at the time of the debarment action. See Roemer v. Hoffmann*, 419 F. Supp. 130 (D.D.C. 1976). Termination of the errant employee may reestablish the responsibility of the convicted corporation. "Affording the contractor this opportunity to overcome a blemished past assures that the agency will impose debarment only in order to protect the Government's proprietary interest and not for the purpose of punishment." *Robinson v. Cheney*, 876 F.2d at 160.

When the subject of a debarment is a natural person, and that person was previously convicted of an offense, particularly a procurement offense, it is clear that the conviction and the severity of the illegal conduct is relevant to whether the individual has reformed and is presently responsible, since the subject of the debarment is the same individual who committed the offense. A corporation, on the other hand, is not capable of performing any acts without the intervention of natural persons. While it may not be necessary to justify debarment of a corporation to show any *criminal* responsibility of an individual who continues to act for the

[6] Although the notice states "conviction of bribery," it clearly refers to the conviction referenced in the introduction to the notice which stated, "[o]n March 14, 2003, Fort Myer pleaded guilty to conspiracy to commit bribery with its role in distributing cash bribes to District Department of Public Works (DPW) officials in exchange for the DPW officials agreeing to accept inflated job tickets for asphalt materials that were never provided to the District."

corporation, there must be a showing that the corporation, at the time of the debarment decision, continues to present, through the *current* management and employees, a serious risk to the government of improper conduct if it continues to do business with the corporation.[7]

As noted above, because of the ongoing criminal proceedings, the CPO could not fully investigate the matter with witnesses involved in the prosecution. Without having much of the evidence set forth above, the CPO made the decision to debar Fort Myer solely on the basis of the criminal conviction. We believe that the CPO did not adequately make findings in the debarment decision to support a conclusion that Fort Myer is not presently responsible. Nor were there adequate findings concerning remedial measures taken by the corporation to prevent a reoccurrence of the criminal conduct, which should be part of a responsibility review.

The essential element of bribery is an unlawful payment. While the District alleges a specific payment of a bribe and a specific bank from which cash for the payment was withdrawn, no evidence is offered as to the account from which the funds were withdrawn. The FBI had access to all of the accounting records of Fort Myer, yet no specific allegation has been made anywhere in the record that the funds used to bribe the inspectors came from Fort Myer or any principal or current employee of Fort Myer. From the lack of evidence proffered by the District as to the source of the funds to pay the bribes, it could be as easily inferred that the rogue asphalt division employees scammed Fort Myer by paying the bribes from their own funds to make their

[7] The U.S. District Court for the District of Columbia considered a similar matter in *Dowling Group v. Williams*, 1982 U.S. Dist. LEXIS 18121 (1982). In that matter the corporation "agreed to plead guilty to the above counts and the government agreed, *inter alia*, not to present an indictment to a federal grand jury charging the Project Manager and the Director of Construction as defendants." In upholding the debarment Judge June Green held that "A review of the entire administrative record indicates that the Debarment Committee has articulated a rational connection between the facts of this case and its decision to debar Dowling" specifically noting that "[t]he fact remains that the main perpetrator of this offense continues to work for Dowling and that no action has been taken against him by the company. In responding to Dowling's petition for reconsideration, the [Debarment] Committee explicitly stated that the debarment was not punitive. Rather, 'the recommendation to debar was based on the fraud conviction of the company which still employs [the Project Manager,] one of the persons involved in the conviction.'" (Id.).

Boards of Contract Appeals have similarly based their decisions to uphold debarment of corporations on continuing relationships with guilty parties. The GSA Board found "the debarring official's imputation of [the guilty officials] impropriety to the corporation to be reasonable, particularly in view of (1) the serious nature of his impropriety, (2) the corporation's continued employment of [the official], who as a co-owner in this closely held corporation, may have considerable influence on corporate decisions, even though he is no longer an officer of the firm and does not perform any duties related to the firm's Government work; and (3) firm's failure to show that it has established meaningful controls to preclude a recurrence, aside from [the official's] resignation as president." *Albert Alperstein and Alperstein Brothers, Inc*, 1982 GSBCA LEXIS 104, 5-6 (1982).

The Agriculture Board upheld a corporate debarment on the same basis. Appellant "contended that the integrity of the firm had not been impaired by its conviction." *Stevens Foods, Inc., And Steven L. Aaron*, 81-1 B.C.A. ¶14,960 (1981). In upholding the Debarring Officer's decision to debar the corporation, the Board found that "[t]he fact remains . . . that your company [and] its President . . . have been convicted of serious offenses directly related to performance of Government contracts. Your President . . . is still deeply involved in the management of the firm.

Even continued employment of a person who has himself been disbarred does not necessarily require debarment if that person has been "walled-off" from government contracts. In determining whether a debarment was proper, the GSA Board concluded "the proposed debarment of BWO may not be based on its relationship with Costacos and that the continued employment of Costacos by BWO does not constitute a cause of so serious or compelling a nature that it affects the present responsibility of BWO. . . ." *In re Jerry Costacos, et al.*, GSBCA Nos. 7547-D, 7548-D, 7549-D, 7622-D (Apr. 9, 1985).

own performance appear better. *See Robinson v. Cheney*, 876 F.2d at 159. The hearsay and somewhat inconsistent information about Mr. Rodriguez's involvement, if any, in the criminal conduct should be more fully explored and addressed by any subsequent debarment official. If a principal of the corporation makes the corporation an unacceptable risk due to the principal's personal involvement, or acquiescence, in improper conduct, then the decision should make findings to that effect.

There is no indication in the record that any individual currently associated with Fort Myer has been charged, indicted or convicted of any criminal conduct or named as a coconspirator or identified as a participant in any criminal activity. The CPO did not make findings of a relationship of any current Fort Myer principal or employee in the criminal activity for which Fort Myer plead guilty,[8] leaving unsupported the CPO's conclusion that "Fort Myer's past acts (bribery and receiving payment on false asphalt tickets) . . . affect its present responsibility." In addition, although the CPO stated that he considered mitigating factors, in each instance the CPO determined, referring to the only to the conviction, that the mitigating factor was "outweighed by Fort Myer's past action." (*Id.*).

The debarment of Fort Myer Construction Company is vacated. In light of the fact that information may now be available to the District as to the conduct of the bribery scheme which was not considered by the CPO and the additional grounds for debarment raised before the Board, this matter is remanded to the CPO for further consideration of whether such information may support debarment of Fort Myer.

**SO ORDERED.**

January 16, 2004

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

CONCURRING:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge

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[8] The decision concluded with regard to debarment of the Fort Myer principals:

> District Paving was absorbed by Fort Myer in 1995. The results of the DoJ investigation revealed that the conspiracy to commit bribery and receive payment for false tickets occurred between in or about 1995 until in or about March, 1998. Therefore, the misconduct occurred during the time principals, Mr. Rodriguez and Mr. Shrensky were managing the newly acquired District Paving and Fort Myer. As principals of Fort Myer, Mr. Rodriguez and Mr. Shrensky participated in, knew of or had reason to know of the misconduct occurring within their company.

Such boilerplate language, based only on the coincidence of time, is not sufficient to support a finding of actual involvement by the principals.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
**CONTRACT APPEALS BOARD**

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| APPEAL OF: | ) | |
| | ) | |
| TRANSWESTERN CAREY WINSTON, L.L.C. | ) | CAB No. D-1193 |
| | ) | |
| Under Contract No. DCPS-97104-6531-OA | ) | |

**OPINION GRANTING SUMMARY JUDGMENT**
*(Courtlink Filing Id 3397372)*

Appellant, Transwestern Carey Winston, L.L.C, ("Transwestern") and Appellee District of Columbia Public Schools ("DCPS") entered into a contract effective July 18, 1997, (Contract, Appeal File (AF) Ex. 1), for, among other purposes, leasing services for excess school buildings. DCPS agreed to pay Transwestern a "Lease Fee [of] 3% of gross rent less any concessions. . . ." (*Id.* Appendix I[1]). Transwestern secured a 20-year lease for the Carter G. Woodson School. (AF, Ex. 12). The lease agreement, after stating the rent, provides that the "[r]ent shall however be reduced by such amounts as [lessee] spends on capital improvements to the premises approved and constructed." (*Id.*, Art 4(b)). The question presented in this appeal is whether a rent reduction for capital improvements constitutes a "concession" resulting in a reduction in the rent upon which the lease fee payable to Transwestern is computed. It is the position of the Appellant that the credit for capital improvements is not a "concession" and that Transwestern is entitled to a lease fee of $248,686.32 based on the total gross rent. It is the position of DCPS that the credit is a rent concession and that Transwestern is only entitled to a fee of $37,290.00 based on the minimum rent. Transwestern has moved for summary judgment as to the amount of the commission to which it is entitled. The Board agrees with Appellant that the credit for capital improvements is not a "concession" as contemplated by the contract and grants judgment to the Appellant in the amount of $248,686.32, less any amounts previously paid to Appellant as a lease fee for the Woodson School lease, payable as rent payments are received by the District from the lessee.

## FACTS

On May 16, 1997, after a qualification process, DCPS selected Appellant "to be one of four companies to assist the . . . Public Schools in the disposition and reutilization of our excess school properties." (Letter from Suzanne H. Conrad, AF, Ex. H). In the selection letter, the District proposed a commission schedule which, with regard to leases, provided for a "Lease Fee [of] 3% of gross rent less any concessions." The proposed compensation was accepted by Transwestern. A contract incorporating the May 16, 1997, letter as its compensation terms was

[1] The contract states in Article IV, § A that "D. C. Public Schools agrees to pay the Contractor for all services rendered . . . in accordance with the fee schedule attached in Appendix I. No fee schedule was attached to the contract. The parties agree that Ms. Conrad's letter dated May 16, 1997, was intended as the fee schedule. (Motion, 2; Opposition, 2).

signed effective July 18, 1997. (Answer ¶ 6) The contract was drafted by DCPS (*Id.*). The record does not indicate that there was any discussion of the language of the contract or of the compensation schedule prior to execution.

Transwestern sought lessees for a number of excess school buildings. On February 2, 2000, DCPS signed a lease with a party secured by Transwestern for the Weatherless School. (Motion, Ex. 3). Article 4(B) of the Weatherless School lease negotiated by DCPS provided that the lessee was entitled to a credit against rent for payments made for approved capital expenditures subject to a minimum rent which limited credits to approximately 83% of the contract rent. (Minimum rent of approximately 17% of base rent). Capital expenditures were approved for the Weatherless School. Transwestern did not consider the credit for capital expenditures to be a "concession" to be deducted from the gross rent for purposes of computing the lease fee. On March 1, 2000, Transwestern invoiced DCPS for its lease fee on the Weatherless lease. Transwestern computed its compensation pursuant to the total gross rent, with escalation, but without deduction for approved capital expenditures. Transwestern's invoice to DCPS clearly showed that the credits were not deducted showing on its face:

"Less Concessions $0.00."

The invoice was paid by DCPS without objection. (Interrogatory Answer 15).

Transwestern secured a lessee for the Carter G. Woodson School. (Interrogatory Answer 8). The Woodson lease, executed on May 26, 2000, well after Transwestern had invoiced DCPS for the Weatherless lease fee, contained a provision for capital expenditure credits identical to the Weatherless lease and a similar, approximately 17%, minimum rent provision ($1,243,000 over the lease's full term). (Motion, Ex. 6). DCPS approved approximately $12,261,983 in capital improvements resulting in only the minimum rent being payable. On August 21, 2000, Transwestern submitted an invoice for a lease fee of $248,686.32 based, as was the previous invoice for the lease fee on the Weatherless School lease, on the full rent amount, including escalation ($8,289,544), without deduction for any capital improvement credit.

On December 2, 2002, the contracting officer denied Transwestern's claims for commissions in excess of $37,290 asserting that:

> . . . [Transwestern's] claim is based upon its interpretation that when improvements are being made on property such as Friendship, these "are not considered as concessions." The agreement [Transwestern] entered into with [DCPS], with no objections or changes made during negotiations prior to contract execution by the parties, is that improvements are considered to be concessions.

The decision further stated:

> [DCPS] cannot from a prudent business perspective pay to [Transwestern] more than [DCPS] receives as "proceeds" for rent.

Transwestern appealed the Contracting Officer's decision to the Chief Procurement Officer. On January 7, 2003, the Chief Procurement Officer affirmed the decision of the contracting officer copying the contracting officer's decision almost verbatim[2] but emphasized that "the real issue here as the contracting officer's Decision clearly stated is that [DCPS] cannot, from a prudent business prospective pay to [Transwestern] more than [DCPS] receives as 'proceeds' for rent."

**DISCUSSION**

Whether or not DCPS's interpretation of the meaning of "concessions" is correct, the stated basis of the contracting officer's decision and its adoption by the Chief Procurement Officer is plainly wrong. The contracting officer asserts that DCPS cannot, from a prudent business prospective, pay Transwestern more than DCPS receives as proceeds for rent. Even if that proposition is true, it is irrelevant, since Transwestern's claim does not request an amount greater than the minimum cash proceeds of the rent. Transwestern claims 3% of the rents due before credits for capital improvements. The minimum rent to be collected by DCPS during the term of the lease is approximately 17% of the rents due before credits. DCPS concedes that they will receive $5,250 per month for over 19 years. Transwestern claims that it is entitled to $248,686.32. DCPS will receive in excess of the claimed amount as cash proceeds from rent in the first 4 years of this 20 year lease. It is mathematically impossible that the 3% commission to which Transwestern claims it is entitled could ever exceed the 17% minimum rent.

Notwithstanding the flawed logic, the issue still remains before the Board as to the proper interpretation of the contract. The contract was drafted by DCPS. (Answer ¶ 6). The meaning of the term "concessions" which is in dispute is not defined in the contract, nor was it discussed in contract negotiations. It appears that Transwestern acted on one assumption as to the meaning of concession and that DCPS acted on another. Transwestern assumed that the term "concessions" did not include credits for capital improvements. DCPS assumed that credits for capital improvements were "concessions" and were therefore properly deductible from Gross Rent when computing the lease fee.

"Whether or not a contract is ambiguous is a question of law for the [Board]. A contract is not rendered ambiguous merely because the parties disagree over its proper interpretation. Instead, a contract is ambiguous when, and only when, it is, or the provisions in controversy are, reasonably or fairly susceptible of different constructions or interpretations, or of two or more different meanings. If there is more than one interpretation that a reasonable person could ascribe to the contract, while viewing the contract in context of the circumstances surrounding its making, the contract is ambiguous. The choice among reasonable interpretations of an

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[2] The Chief Procurement Officer does not explain his difference in computation from the Contracting Officer. The Contracting Officer stated "The rent of $5,250/month for the remaining period of 236 months after the initial construction period is the "gross rent less commissions" allowed under the lease . . . . Accordingly, [Transwestern] is eligible for payment of commission of up to a maximum of $37,290." [In making that computation, the contracting officer actually allowed for the 236 months plus $4,000 for the construction period.] The Chief Procurement Officer copied the same statement "The rent of $5,250/month for the remaining period of 236 months after the initial construction period is the "gross rent less commissions allowed under the lease" but does not explain how he then computed "the total commission of $34,915 previously paid by [DCPS] for leasing Woodson is considered as full amount due [Transwestern] for their brokerage services for this transaction."

ambiguous contract is for the factfinder to make, based on the evidence presented by the parties to support their respective interpretations." *Gryce v. Lavine*, 675 A.2d 67 (D.C. 1996). The first step in contract interpretation is determining what a reasonable person in the position of the parties would have thought the disputed language meant. *Intercounty Constr. Corp. v. District of Columbia*, 443 A.2d 29, 32 (D.C. 1982). Where the court is faced with an integrated agreement which contains ambiguous terms, the standard of interpretation is "what a reasonable person in the position of the parties would have thought it meant." *Minmar Builders, Inc. v. Beltway Excavators, Inc.*, 246 A.2d 784, 786 (D.C. 1968) {quoting Samuel Williston, *A Treatise on the Law of Contracts*, §94:294 (3d ed. 1961, Supp. 1967)). "The presumption is that the reasonable person knows all the circumstances before and contemporaneous with the making of the integration. The reasonable person is also bound by all usages -- habitual and customary practices -- which either party knows or has reason to know. The standard is applied to the circumstances surrounding the transaction and to the course of conduct of the parties under the contract, both of which are properly considered when ambiguous terms are present." *1901 Wyoming Ave. Cooperative Asso. v. Lee*, 345 A.2d 456, 461-62 (D.C. 1975). If the ambiguity is still not resolved, the Board will apply the rule construing the contract against the drafter. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 328 (D.C. 2001).

The common meaning of "concession" is "to concede," that is, to "give or grant as a privilege or right." (*Webster's II, New Riverside University Dictionary*, Riverside Pub. Co. 1984). The term "concession" generally connotes a give-back without quantifiable consideration, such as a month's free rent for signing a longer term lease, or a payment made to release a new tenant from a prior lease. It clearly does not include a "set-off," which is a counterdemand held by one party against another, extrinsic to the obligation. (*Black's Law Dictionary* (4th ed.), 1951). The capital improvement credits in the instant matter appear to be closer to a set-off than free rent. The capital improvement credits may only be earned for approved projects that "(1) have been completed, (2) have been fully paid for . . . , and (3) satisfied applicable inspection and certification requirements, prior to the credit being taken against rent due." (Lease, Art. 4(B)). Since such improvements "become and remain the property of DC upon expiration of the lease" (*Id.*, Art. 12), DCPS is exchanging value for the capital improvement, that is, setting off the cost of construction of what will become DCPS property, rather than giving up a concession.

The Board also notes that interpreting the capital improvement credits as deductible concessions would result in uncertainties in payments under the contract if the improvements were made after the first four years of the lease term. Although the Woodson lessee seems to have made the improvements for which the credits are granted at the beginning of the lease term, the lease permits the lessee, subject to approval, to make creditable improvements at any time during the lease term. By the Public School's interpretation, including capital improvement credits as concessions, if the building was occupied, but no improvements made in the first year, the leasing agent would be paid the full leasing fee from the rent, but be obligated to repay most of the commission in future years when the "concession" is granted. There is no indication that a recomputation and repayment of leasing fees already paid is contemplated in the contract. Such a result would be the equivalent of requiring a leasing agent to repay commissions if a lessee defaults after the leasing fee is paid. In either case, the total rent paid to DCPS would be less than the amount on which the lease fee was computed.[3] The Board finds that the reasonable common interpretation of the term "concession" is that it does not include credits for capital improvements.

Contract appeals boards have "long recognized that as an interpretative device custom and trade usage is a not only a valuable tool for explaining undefined terms . . . but is also useful in analyzing the reasonableness of the parties' respective positions . . . . [P] arties draw their agreement in light of the trade customs and practices of the relevant business community." *Custom Printing Co*., GPOBCA No. 28-94. Mar. 12, 1997, 1997 GPOBCA LEXIS 2, 74. "It is always appropriate, in explaining or defining contract terms, to consider the meaning attributed to those terms in the relevant trade or industry. Often, evidence of trade custom or usage is the means by which the connotation that would be accorded a contract term 'by a reasonably intelligent person acquainted with the contemporaneous circumstances' may be ascertained." *Equitable Life Assurance Society of the United States*, GSBCA No. 8909, 90-3 BCA ¶ 23,130 (citing *W.G. Cornell Co. v. United States, W. G. Cornell Co. v. United States*, 179 Ct. Cl. 651, 376 F.2d 299 (1967)). Transwestern submitted the affidavits of two expert witnesses to demonstrate customary practices in the real estate industry. (Motion, Ex. 16). DCPS acknowledges that each of the experts has extensive experience "in the lease and sale of commercial office buildings and properties." Opposition 4. DCPS does not challenge the analysis or conclusions of Appellant's experts, but rather challenge the expertise of the affiants on the basis that there is no showing that the experts have experience in the "type of lease in dispute in this case," namely, "special purpose zoning properties," (Opposition 4-5), apparently conceding that the experts' conclusions as to the industry practice are accurate for the lease of commercially zoned properties. DCPS gives no reason why the distinction as to zoning is at all relevant. Neither the subject contract, and specifically the fee provision, nor the leases in question refer to zoning in any way. School properties for which the Transwestern contract applies may be in various zoning categories, or unzoned. The Board is unaware of any such distinction in the real estate industry. To conclude that there is such a distinction would cause the fees pursuant to this contract to be computed differently depending on the zoning of the school building in question. Each of Appellant's witnesses concluded that, in the real estate leasing industry, the term concessions would not be expected to include capital improvement expenditures regardless of the zoning of the property. (Motion, Ex. 16).

DCPS submitted the opinion of one expert witness.[4] At the outset of his opinion, the expert refers to the construction credits as "'set-off' concessions." (*Id*., 1). As noted above, in standard usage a "set-off" is a "counterdemand" rather than a "concession." The expert proceeds to make a detailed analysis of the terms of the lease in order to compute what he refers to as the "cumulative value" and the "fair market value" of the lease. (*Id.*, 2). Neither of these concepts is referred to in the contract fee computation. Further, the Board is at a loss to understand the relevance of the expert's discussion of "implied debt service" or "the amortized cost of the

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[3] The Board notes that, since the lessee may cease paying rent, the full fee might be reduced if a default occurred prior to the full fee being paid from the rent received.

[4] Appellant questioned the independence of the expert proffered by DCPS. DCPS does not deny that the expert offered is sharing in a brokerage commission for the lease of another school building. It is not necessary for the Board to decide whether the expert is, in fact, independent.

capital improvement allowance" which are also not referenced in the contract or lease agreement. The expert opinion does not controvert relevant facts in this matter, nor does it inform the Board of industry practice.[5] To the contrary, DCPS's expert, rather than expressing an opinion as to real estate industry practice, merely attempts to determine the "intent" of the parties. The opinion concludes:

> It therefore leads me to believe that the value of the capital improvement allowance was intended to offset the minimum rather than the maximum improvement set-off rather than vice versa and as such the corresponding minimum rather than maximum rent prevail.[6]

(*Id.*, 3)

The Board is not persuaded by the proffered opinion of the DCPS expert. The Board accepts the opinions of Appellant's experts as indicative of the meaning of the fee provisions in the real estate industry. To adopt DCPS' position that the fee structure is dependent on the zoning of the property would be to conclude that, without any mention, the compensation term is to apply differently depending on the underlying use. There is no support for that position.

## CONCLUSION

The Board finds that a reasonable person in the real estate industry would have concluded that the term "concessions" did not include credits for capital improvements. This position is also supported by the initial course of conduct of the parties. *See Fort Myer Construction Corporation,* DCCAB No. D-1195, 2003 DCBCA LEXIS 8, 14. The District paid Appellant a previous claim for lease fee which did not deduct capital improvement credits without objection.[7] Lastly, even if DCPS's interpretation were equally reasonable as Appellant's interpretation, an ambiguous clause will be read against DCPS as the sole drafter of the contract language. See *MCI Contractors, Inc.*, CAB No. D-1056, Mar. 27, 2002, 50 D. C. Reg. 7412, 7417, 8236, 2002

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[5] DCPS argues that this motion is premature because "Appellee's expert has not been deposed in this case." (Opposition 4). While a party may be entitled to depose an <u>opponent's</u> expert witness prior to the Board's consideration of the <u>opponent's</u> expert witness, a party may not resist summary judgment on the basis that it is unaware of what its own expert witness will testify to.

[6] Even as to intent, the Board is at a loss to understand the expert's statement that "the value of the capital improvement allowance was intended to offset the minimum rather than the maximum improvement set-off rather than vice versa." The lease sets no "minimum" or "maximum improvement set-off." Since no capital improvements are required by the lease, the minimum improvement set-off would be 0.

[7] Certain documents produced in discovery (*e.g.* Memo from Joan E. McKenzie to Veronica L. Falwell, Deputy Director of Real Estate dated March 28, 2001, (Motion, Ex. 14)) indicate that DCPS relied, at least in part, on an assertion that Jones Lang LaSalle Americas, Inc. interpreted its similar commission agreement with DCPS as requiring it to deduct the cost of capital improvements made by the lessee of the Randall school from the gross rent and to calculate its commission on the reduced rent. The Board notes, however, that the capital improvement credit in the Randall lease was limited to $250,000, while the effective amount of the Woodson capital improvement credit was over $7 million. (*Id*., 2) Although it appears that the Jones Lang LaSalle may never have been paid since the Randall tenant defaulted, (*Id.*), the maximum reduction in commission was $15,000 or less than 10% of the commission without deduction of the capital improvement credits. In the instant matter, the commission reduction claimed by DCPS resulting from the capital improvement credit is $211,396, or 85% of the total commission

DCBCA LEXIS 2, 15. Judgment is granted to Appellant in the amount claimed of $248,686.32, less any amounts previously paid to Transwestern as a lease fee for the Woodson School lease, payable as rent payments are received by the District from the lessee.

**SO ORDERED**

April 9, 2004

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

CONCUR:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge

/s/ *Warren J. Nash*
WARREN J. NASH
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA

**CONTRACT APPEALS BOARD**

PROTEST OF:

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| Fort Myer Construction Corporation | ) | |
| | ) | CAB No. P-0685 |
| Under Solicitation No. POKA-2003-B-0048-JJ | ) | |

For the Protester, Fort Myer Construction Corp.: Joe R. Caldwell, Jr., Esq., O. Kevin Vincent, Esq. and Robert J. Wagman, Esq., Baker Botts L.L.P. For the Government: Howard S. Schwartz, Esq. and Talia S. Cohen, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Warren J. Nash concurring.

**OPINION**

*(LexisNexis Filing ID 3531737)*

Fort Myer Construction Corporation was the second low bidder on each of the two award groups of a procurement[1] for road repair services. The Lane Construction Corporation was the low bidder on each award group. Fort Myer protests against award to Lane alleging that Lane's bid was nonresponsive due to a failure to include a notarized subcontracting plan as part of its bid.[2] The District responds that failure to submit a subcontacting plan is a matter of responsibility which may be cured after bid opening and not a matter of responsiveness required to be complete at the time of bid opening. The Board agrees with the District and finds the low bid to be responsive. Fort Myer's protest is denied.

**BACKGROUND**

The facts are not in dispute. On December 5, 2003, the Office of Contracting and Procurement ("OCP") issued Solicitation No. POKA-2003-B-0048-JJ ("IFB") on behalf of the District's Department of Transportation for repairs to curbs, gutters, sidewalks, utility cuts, and

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[1] Fort Myer's own bid was rejected by the contracting officer as nonresponsive for failure to quote a price for one pay item. Fort Myer protests this rejection. In light of the Board's holding that award to the low bidder is proper, it is not necessary to determine whether Fort Myer's bid was responsive to resolve this protest. Fort Myer has filed a subsequent protest (CAB No. P-0688) against award of both award groups to Lane. In the event the Board determines that award of both award groups to the same contractor violates the terms of the solicitation, the issue of the responsiveness of Fort Myer's bid will be ripe for decision.

[2] Capitol Paving of D.C. was the third low bidder. Fort Myer asserts that Capitol's bid is also nonresponsive for the same reasons as Lane's. Although Capitol also did not submit a subcontracting plan, the issue of the responsiveness of Capitol is not identical to the responsiveness of Lane. Section M.B. of the solicitation, which requires the subcontracting plan, incorporates § M.C. Section M.C.'s requirements apply only to "any contractor seeking a preference on the basis of proposed subcontracting . . . ." Capitol is itself a certified local business enterprise and is not required to seek preference on the basis of proposed subcontracting. In light of the Board's holding , it is not necessary to determine whether Capitol properly claimed its LBE status.

base pavements. (Agency Report ("AR") Ex. 1). Section M.B. of the IFB provided that the contractor must either be a local, disadvantaged or resident business enterprise, or subcontract 50 percent of the dollar value of the contract to such an enterprise. Section M.B. further required that the contractor "shall submit with its bid or proposal a notarized statement detailing its subcontracting plan." (*Id.*).

On March 5, 2004, Fort Myer and two other bidders timely submitted bids in response to the IFB. (AR Ex. 2). In lieu of a subcontracting plan, Fort Myer submitted a notarized statement that it was a local business enterprise and therefore not required to submit a subcontacting plan. As part of its notarized statement, Fort Myer included a certification that it would perform 99% of the contract work and an agreement to liquidated damages in the event that it violated the certification.[3] Each of the bidders signed their bids accepting all of the terms of the solicitation without reservation and agreed to perform "in strict accordance with the terms of the solicitation. . . ." (Block 19), however, neither of the two low bidders included a subcontracting plan or statement of any sort concerning the set-aside requirements with their bids or otherwise specifically acknowledged the subcontracting requirements. Upon opening the bids, the District initiated a pre-award review of Lane as the apparent low bidder, requesting, among other items, a subcontracting plan. On March 17, 2004, Lane submitted a subcontracting plan which complied with the contract requirements.[4]

## DISCUSSION

"Generally, a requirement that bidders list subcontractors in their bids involves a matter of responsibility because it relates to the agency's need to evaluate the subcontractors' qualifications or the bidders' ability to meet equal employment opportunity and minority business requirements." *A. Metz, Inc.*, B-213518, April 6, 1984, note 2, 84-1 Comp. Gen. Proc. Dec. ¶ 386, 1984 U.S. Comp. Gen. LEXIS 1326. Notwithstanding the general rule, however, a qualification requirement may become an element of responsiveness if specific notice of the requirement is given and bidders are cautioned that failure to deliver the required item with the bid may result in rejection of the bid. *See Welsh Construction Co*, B-183173, Mar. 11, 1975. 1975 U.S. Comp. Gen. LEXIS 2351. No such notice and caution was given in the subject solicitation. Indeed, the language of the solicitation can be read to the contrary. Section M.B. states that "[o]nce the plan is approved by the contracting officer, changes will only occur with the prior written approval of the contracting officer" implying that the bidder may make changes after submission of the bid, but prior to approval by the contracting officer. If the subcontracting plan was essential to a responsive bid, the plan would be final upon submission and no changes

[3] The procurement regulations provide that "if a solicitation contains LBE or DBE requirements, it shall also contain a liquidated damages clause in the event that a prime contractor fails to make good faith efforts to comply with its plan." (27 DCMR 804.9) The subject solicitation technically complies with the regulation, however, the amount of liquidated damages is so trivial as to make the provision meaningless. The solicitation provides for liquidated damages of "twenty-five dollars ($25)" for each day that the contractor is in violation of the subcontracting requirements. This amounts to a maximum of $9,125 if the contractor were in violation for a full year. The subcontracting plan submitted by the low bidder estimates the total value of subcontracts as $4,870,059 for the first year. This penalty for violation of the set-aside requirements is hardly likely to be an incentive to comply with the contract terms.

[4] Lane subsequently amended its subcontracting plan on March 23, 2004.

could be permitted after bid opening. The Board notes that the procurement regulation requires that the subcontracting plan be "notarized." (27 DCMR § 804.9). While this requirement may underscore the importance[5] of the plan, the Board does not find that notarization makes the required plan an element of responsiveness.

By signing the bid without reservation, Lane committed itself unequivocally to the terms of the contract, including the 50% set-aside subcontracting requirement. *C&D Tree Service, Inc.*, CAB No. P-0295, Nov. 2, 1993, 41 D.C. Reg. 3691, 3696-97; 1993 DCBCA LEXIS 342. The Board finds that Lane's bid was responsive and that the District could properly receive the subcontracting plan after receipt of bids in order to determine Lane's responsibility. The protest is denied.

May 5, 2004

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

Concur:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge

/s/ *Warren J. Nash*
WARREN J. NASH
Administrative Judge

[5] Other than distinguishing the document from other required submissions, notarization appears to be of little legal effect.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

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| AMERICAN CONSULTANTS AND MANAGEMENT ENTERPRISES, INC. | ) | |
| | ) | CAB No. P-0683 |
| Under Solicitation Nos. PO-JA-2002-R-0037, and PO-JA-2004-R-JD001 | ) | |

For the Protester: Mr. Ernest Middleton, *pro se*. For the District of Columbia Government: Howard Schwartz, Esq., and Talia S. Cohen, Esq., Assistants Corporation Counsel, D.C.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

## OPINION

*LexisNexis Filing ID 3590011*

Protester, American Consultants and Management Enterprises, Inc. ("ACME"), has protested the cancellation of one request for proposals ("RFP") and the issuance of another RFP for what ACME says are essentially the same juvenile substance abuse treatment services. We conclude that there was a reasonable basis for the cancellation of the original solicitation and the issuance of the replacement solicitation based on substantial changes to the scope of work. Further, we find no evidence of bad faith by the contracting agency. Accordingly, we deny ACME's protest.

## BACKGROUND

On March 12, 2002, the District's Office of Contracting and Procurement ("OCP") issued Request for Proposals No. PO-JA-2002-R-0037 ("RFP-1") on behalf of the Department of Human Services, Youth Services Administration ("YSA"), for a contractor to provide a therapeutic substance abuse community model and related services for 40 male youth and 10 female youth committed to the Oak Hill Youth Center. (Agency Report ("AR"), at 2; AR Ex. 1). OCP issued seven amendments to the solicitation prior to its closing on August 5, 2002. (AR, at 2; AR Ex. 2). One of the amendments removed the services to female youth. ACME, Systems Assessment and Research, Inc. ("Systems"), and Desert Counseling Clinic, Inc., submitted proposals in response to the amended solicitation. Desert Counseling did not respond to several requests by the District to extend its offer beyond the 150 days required by the solicitation.

OCP prepared a pre-negotiation business clearance memorandum requesting approval to enter into discussions with the two remaining offerors. (AR Ex. 4). The Procurement Review Committee approved the pre-negotiation business clearance memorandum on April 16, 2003, and discussions with the two remaining offerors were held on April 30, 2003. (AR Ex. 1). Following discussions, Gayle Turner, then Administrator of YSA, informed OCP that YSA only needed treatment services for 20 male youth, rather than the 40 called for in the solicitation. (AR Ex. 1). She requested that the solicitation be amended (prior to OCP's issuing of the request for Best and Final Offers ("BAFO")) to reduce the number of youth to be served from 40 to 20 and likewise to reduce the number of counselors from four to two to maintain the counselor to youth ratio at 1:10. Ms. Turner also requested that the number of option years be reduced from four to two.

Responding to YSA's request, the contracting officer issued, on June 3, 2003, Amendment No. 8, making the following changes to the solicitation:

1. Reducing the number of youth to be served per month from 40 to 20;
2. Reducing the number of option years from four to two; and
3. Reducing the staffing levels from the previous requirement for a clinical supervisor, full-time clinician, and four substance abuse counselors, to a clinical supervisor, a half-time clinician, and two substance abuse counselors.

(AR Ex. 2).

The deadline for submission of BAFOs was August 5, 2003. ACME submitted a BAFO by the deadline. Systems indicated that the District should consider its initial proposal as its response to the BAFO. The District evaluated the BAFOs. The technical evaluation panel submitted the final evaluation report to the contracting officer on October 23, 2003. (AR, at 3; AR Ex. 1). In November and December 2003, ACME completed various preliminary compliance and survey activities with a view to receiving award, but no award was made.

Before the contracting officer completed his independent assessment of the offerors' proposals and before any source selection decision had been made, the newly appointed Director of the Department of Human Services and the Interim Administrator of YSA reviewed the statement of work of the amended solicitation. (AR, at 3; AR Ex. 1). Upon their review, they determined that the solicitation's requirements did not sufficiently meet the substance abuse treatment needs of the youth committed to the Oak Hill Youth Center.

On January 6, 2004, the YSA Interim Administrator prepared findings supporting a determination to cancel the solicitation. (AR Ex. 1). The YSA Administrator identified three main reasons for canceling the solicitation. First, the therapeutic community model, upon which the treatment requirements were designed, is not the best treatment method to address the problem of the youth committed to YSA's care. According to the YSA Administrator, the therapeutic community model is designed for youth who will be treated for one year or longer. However, the youth who are committed to Oak Hill generally stay for periods of 45 days to nine months. Thus, there is insufficient time for the youth to profit from a therapeutic community model treatment approach. In addition, the Administrator notes that the substance abuse patterns of the youth at Oak Hill ranges from experimentation to daily usage, and that it would be inappropriate to place youth who occasionally experiment with drugs in a long-term therapeutic community program. (AR Ex. 1). Second, YSA needs a contractor to provide substance abuse treatment services for 40 male youth, not 20 as provided in the amended solicitation, because approximately two thirds of usual population of 85 youth at Oak Hill has some sort of substance abuse problems. With a requirement for 40 youth, YSA will be able to serve about 50 percent of the committed youth each day. Third, a higher ratio of treatment staff to youth, such as 1:5, is needed rather than the 1:10 that had been specified. The YSA Administrator states that given the wide range of substance abuse patterns and the realization that these problems do not exist in isolation, the higher staff ratio will help YSA better serve the youth suffering from substance abuse problems. In the findings, the YSA Administrator also states that because the District's needs have substantially changed, a new solicitation should be issued that incorporates the three requirements discussed above. (AR Ex. 1).

On January 8, 2004, the Director of the Department of Human Services approved the YSA Administrator's findings, and on February 5, 2004, the Chief Procurement Officer signed the determination and findings to cancel the solicitation. The Chief Procurement Officer transmitted a copy of the determination and findings for the cancellation to the Inspector General as required by law on February 9, 2004. On February 10, 2004, a contracting officer sent notices of the cancellation to the offerors, citing as authority certain regulations contained in 27 DCMR Chapters 15 (relating to IFBs) and 16 (relating to RFPs). On February 13, 2004, OCP issued a new solicitation, No. PO-JA-2004-R-JD001, incorporating the three changed requirements identified in the findings of the YSA Administrator. (AR, at 4; AR Ex. 3). On February 20, Middleton sent a letter to the contracting officer, stating that ACME had spent a great deal of time in responding to the request for proposals, and suggesting that the cancellation action did not show good faith on the part of the District. On February 27, the contracting officer replied to Middleton, stating that the changes to the solicitation were substantial and again citing to regulations supporting the cancellation, this time referring only to 27 DCMR Chapter 16.

On February 25, 2004, ACME filed its protest, challenging the cancellation of the original solicitation as well as the issuance of the new solicitation. ACME argues that its BAFO implemented a cognitive behavioral therapy method required by the new solicitation and thus issuing the new solicitation was unnecessary. Further, ACME argues that the changes from the first solicitation (as amended) to the new solicitation were so insignificant that the changes simply did not justify cancellation and reissuance. Finally, ACME states that the District did not act in good faith in canceling the original solicitation and issuing the new solicitation.

## DISCUSSION

The Board's jurisdiction over this protest is founded on D.C. Code § 2-309.03(a)(1). D.C. Code § 2-303.07 provides that "An invitation for bids, a request for proposals, or other solicitations may be cancelled, or all bids or proposals may be rejected, only if it is determined in writing by the [Chief Procurement Officer] that the action is taken in the best interest of the District government." We have held also, consistent with well-settled procurement law, that a request for proposals may be cancelled if the CPO determines that there is a reasonable basis for cancellation. *Singleton Electric Co.*, CAB No. P-0411, Nov. 15, 1994, 42 D.C. Reg. 4888, 4893; *Shannon & Luchs*, CAB No. P-0415, Sept. 21, 1994, 42 D.C. Reg. 4851, 4859 & n.12; *McMillan Limited Partnership*, CAB No. P-0301, Oct. 22, 1992, 40 D.C. Reg. 4647, 4654 n.6. Chapter 16 of the District's procurement regulations contain the following provision concerning a change in requirements:

> If a change is so substantial that it warrants complete revision of a solicitation, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the state of the procurement. The new solicitation shall be issued to all firms originally solicited and to any firms added to the original list, and shall be advertised in accordance with the requirements of this title.

27 DCMR § 1615.3.

ACME argues that cancellation of the original RFP was not merited because the changes to the requirements were insignificant. We conclude that the findings prepared by the YSA Administrator adequately identify substantial changes to the statement of work justifying cancellation and reissuance. Removing the therapeutic community model treatment approach and increasing the ratio of staff providers to youth from 1:10 to 1:5, taken together, constitute more than an insignificant change to the scope of work. Clearly, under the facts here, the CPO had a reasonable basis for cancellation. ACME's argument that its proposal provided the correct treatment approach is simply irrelevant. The issue is not what one or another offeror agreed to provide but rather the issue is whether the competing offerors had a specification against which to properly formulate their offers and to compete on a fair basis. The District determined that its minimum needs would not be adequately met by the original solicitation as amended and that the new solicitation would properly address those needs. ACME has not rebutted the evidence of the changed requirements placed in the record by the District.

ACME also argues that the District has not shown good faith in conducting the original procurement. ACME's charge never gets beyond argument to evidence. We are not pointed to any specific actions of District officials. ACME does object to having spent considerable time and effort in responding to the original solicitation with an initial proposal and subsequent BAFOs. At the root of its complaint, we think, is that ACME believed it was going to receive an award when the contracting agency conducted preliminary survey and compliance tasks after the BAFO submissions. In any event, evidence of bad faith is entirely lacking in the record. ACME points to the poorly worded notice of cancellation from the contracting officer of February 10, 2004, which identifies IFB cancellation regulations, and the contracting officer's February 27, 2004 letter which contains two incorrect citations to the cancellation regulations in 27 DCMR Chapter 16. These matters, of course, do not begin to approach a showing of bad faith conduct.

In sum, ACME has not shown that the District has violated law or regulation in canceling the original solicitation and issuing a new solicitation to meet its changed requirements. Accordingly, we deny the protest.

**SO ORDERED.**

DATED: May 17, 2004

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

| | | |
|---|---|---|
| ATLANTIC TRANSPORTATION EQUIPMENT, LTD. | ) | |
| | ) | CAB Nos. P-0678, P-0680 |
| Under Contract No. GAGA-2004-C-0014 | ) | (Consolidated) |

For the Protester, Sean W. Glynn, Esq., William W. Goodrich, Esq., Arent Fox Kintner Plotkin & Kahn, PLLC. For the District of Columbia Public Schools: James A. Baxley, Esq., Deputy General Counsel, Lee Rideout, Esq., Office of the General Counsel.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judges Matthew S. Watson and Warren J. Nash, concurring.

**OPINION**

*LexisNexis Filing ID 3676953*

Atlantic Transportation Equipment, Ltd. ("ATEL"), has protested the award of a letter contract by the District of Columbia Public Schools ("DCPS") to Laidlaw Transit, Inc., for the 12 month leasing of 90 school buses for the 2003-2004 school year. ATEL argues that DCPS made an illegal sole source award to Laidlaw, that ATEL was capable of meeting the requirements for the procurement, but that DCPS only issued a solicitation to Laidlaw. DCPS does not claim that this was a competitive procurement or an emergency procurement. Rather, DCPS states that this was a "single available source" procurement authorized by 27 DCMR § 1702.1.

The Procurement Practices Act does not create an exception to competition on the basis of "single available source" as a method differing from sole source procurements. Accordingly, DCPS had to justify departing from the competition requirements by meeting the criteria for a sole source award. We conclude that DCPS has not demonstrated in the record a legitimate basis for conducting a sole source procurement. ATEL claims that the violations were so serious that the contract to Laidlaw must be declared void *ab initio*. Although DCPS violated statutes and regulations, we conclude that the DCPS violations, when considered in the context of the critical need for buses for the beginning of the school year, were not so substantial as to render the contract award to Laidlaw void *ab initio*. We conclude, nevertheless, that Laidlaw has been performing without a valid contract for over three months. DCPS never definitized the letter contract, and by late February 2004 the value of Laidlaw's performance exceeded both the not-to-exceed amount of the letter contract and the Council's statutory review threshold of $1,000,000. Because DCPS has neither requested nor received Council approval, performance by and payments to Laidlaw after late February 2004 have violated D.C. Code §§ 1-204.51 and 2-301.05a.

We sustain the protest, directing that DCPS promptly conduct a competition for its current bus requirements, and that ATEL recover its reasonable proposal preparation costs and costs of pursuing the consolidated protests.

**BACKGROUND**

At the beginning of the 2003-2004 school year, DCPS was required by law to transport 3,790 special education students to their school programs, which are located at over 239 sites in the District, Maryland, and Virginia. To provide appropriate transportation services, DCPS operates 566 different bus routes which requires DCPS to acquire and operate a fleet of at least 623 school buses. (Dec. 8, 2003 Determination and Findings to Proceed with Contract Performance,Gilmore Aff. ¶ 4). For prior school years, Laidlaw and ATEL had been leasing large numbers of school buses to DCPS.

On May 9, 2003, DCPS issued a Request for Quotation ("RFQ") for a 12-month lease of an additional 60 Passenger Class "C" school buses with a deadline for quotations of May 13, 2003. (Joint Ex. 1). DCPS sent this RFQ to six different vendors, including ATEL and Laidlaw. (Comisiak Dep. 22-24 (Joint Ex. 19)). The RFQ consisted of a facsimile cover page from Walter J. Comisiak, a contract specialist for DCPS's Office of Contracts and Acquisitions, and a one-page RFQ, stating in pertinent part: "Please provide the price for a 12 month lease on class C school buses." Three different size buses were specified: 35-Passenger (quantity of 40), 30-Passenger equipped with wheelchair lift (quantity of 10), and 42-Passenger (quantity of 10). The RFQ asked for the unit price of each size bus to be quoted as a monthly lease amount for the 12 months.

On May 12, 2003, Comisiak sent an email to the vendors with the subject line of "60 bus emer. sol." making a number of clarifications to the RFQ, including requesting a purchase price per vehicle, stating that DCPS prefers new buses but that 1999 or newer models with less than 60,000 miles would be satisfactory, that the vendors "use specifications from Solicitation GAGA 2003-B-0119 as a guide (doesn't have to be exact)", and that vendors "must meet the seating requirements in the RFQ." (Joint Ex. 2).

Comisiak sent ATEL an email on May 30, 2003, with the subject line "Emergency RFQ", requesting that ATEL send the quotation information to him and to another DCPS representative. ATEL's George Lowe responded minutes later by reply email providing a quotation to DCPS, with terms for the 60 buses, including a lease period of 12 months, and pricing reflecting the same unit price recently negotiated between DCPS and ATEL for a 1-year extension to an existing "200+ bus contract." Lowe added that ATEL "will require the existing one year contract to be executed and the additional 60 buses to be in a separate contract for 12 months" and that DCPS must verify "that funding for the new 60 bus contract as well as funding for the remaining duration of the 1 year extension contract is in place." (Joint Ex. 3). The record does not contain a quotation from Laidlaw but one other vendor quotation is summarized in a quote tabulation prepared by DCPS. Of the two quotations tabulated, ATEL's terms appear to be the more favorable. (Joint Ex. 21).

Over the following weeks, ATEL and DCPS representatives held numerous discussions and exchanged emails. The discussions included the clarifications sought by ATEL, such as the DCPS source of funding for the 60-bus procurement and the bus specifications set forth in the RFQ. Business terms, including pricing and length of contract were also discussed. ATEL was also concerned about significant delays in large payments due it from DCPS on other ongoing bus contracts with DCPS. (Joint Exs. 2-8, 12, 13).

On the evening of July 3, 2003, Brian Benton, the Chief Financial Officer of ATEL, received a phone call from 4 or 5 DCPS representatives including Cedran Kirksey, Kennedy Khobo, and Fitzgerald Wade. (Joint Ex. 5). DCPS said that the 60 buses that ATEL had bid on were needed right away, in fact, by Monday morning, July 7. (Joint Ex. 5). Benton reminded the DCPS representatives that ATEL was still awaiting acceptance of its terms and confirmation of the requested clarifications, and an update on the status of overdue payments owed to ATEL under its other contracts with DCPS. (Joint Ex. 5). Benton also stated that it would be difficult to dispatch a fleet of buses on such short notice. Khobo then proposed that ATEL "lend" DCPS the buses. Benton said that ATEL needed to be paid its outstanding balance. Khobo said that he would hate to see a newspaper article which indicated that children did not get picked up as a result of ATEL not providing the buses. (Joint Ex. 5, Benton Dep. 7-8 (Joint Ex. 22)).

During the following week there were further conversations and Comisiak set up a meeting on July 14, 2003. It was attended by an ATEL representative, Comisiak, and some of the DCPS representatives who had previously spoken to Benton on July 3 inquiring about the delivery of the 60 buses. At the meeting there was further discussion concerning the specifications for the buses and the funding for the contract. DCPS indicated that the specifications were being relaxed. (Comisiak Dep. 13, 26).

On July 24, 2003, it appears that Comisiak faxed to Laidlaw a hand-annotated version of the original May 9 RFQ. (Joint Ex. 27). The only difference appearing on this document was that the quantity of buses was increased as follows: the quantity of 35-Passenger buses was increased from 40 to 65, the quantity of 30-Passenger buses equipped with wheelchair lifts was increased from 10 to 15, and the quantity of 42-Passenger buses remained the same at 10. Thus, the RFQ sought a 12-month lease price for a total of 90 buses.

Comisiak and the DCPS contracting officer, Annie Watkins, recall hearing, probably from Fitzgerald Wade of DCPS, about an increased requirement of 90 rather than 60 buses, sometime in late July 2003. (Watkins Dep. 12-14; Comisiak Dep. 52-57). Watkins thought she instructed Comisiak around July 30, 2003, to send an informal request for quotation to both Laidlaw and ATEL for the new 90-bus requirement. Comisiak thought he sent the requirement to both Laidlaw and ATEL around July 30. (*Id.*).

We find from the record that Comisiak inexplicably failed to fax to ATEL the same hand-annotated RFQ that apparently he faxed to Laidlaw on July 24. Unfortunately, Comisiak was not questioned about the July 24, 2003 RFQ found at Joint Ex. 27 at the time of his deposition because DCPS could not locate any RFQ or solicitation for the 90-bus requirement until the Board ordered DCPS to obtain such documents from Laidlaw. DCPS did not obtain Laidlaw's documents until the end of the hearing on March 10, 2004, which was conducted to obtain testimony from David Gilmore, the DCPS Transportation Administrator.

In an email sent to Laidlaw representatives bearing a date of July 30, 2003, and a time of 8:27 a.m., Comisiak, stated the following: "Please provide price and delivery for 95 buses w/ maintenance. ASAP. Thanks; Walt." (Joint Ex. 29). Laidlaw responded at 8:50 a.m.:

Walt – Do you have any specs for the buses or the term of the lease (should we assume 1 year)? I assume we could roll these additional buses into our existing (unsigned) lease agreement. Please let me know ASAP. Thanks! -- Steve"

(Joint Ex. 29). The Laidlaw representative responding to the July 30 email apparently was unaware of the earlier July 24, 2003 hand-annotated RFQ that had been faxed to another office of Laidlaw.

Although Comisiak thought that he must have sent a similar email request to ATEL for the 90 (or 95) bus requirement, he could find no evidence of sending such an email, and ATEL states that it never received any email. We find that DCPS failed to send to ATEL the hand-annotated RFQ, or any document indicating the new requirements, at any point in July 2003.

Meanwhile, however, ATEL had arranged for a meeting on July 30, 2003, with David Gilmore, the recently court-appointed Transportation Administrator for DCPS, and Patrick Kean, Gilmore's chief operating officer, to discuss the large payments DCPS owed to ATEL on its existing bus contracts. Attending the meeting for ATEL were Brian Connolly, its CEO, and George Lowe, its consultant for the bus contracts. Gilmore had been appointed Transportation Administrator by order of the United States District Court on June 25, 2003. (Joint Ex. 25; Hearing Tr. 6-7). At the meeting, Gilmore opened by asking Connolly, "Where's my buses?" (Lowe Dep. 15). Lowe responded, "Where's our money?" (Lowe Dep. 17-18). ATEL also inquired whether DCPS had a source of funding to acquire the 60 buses it was now soliciting. (Lowe Dep. 15). Gilmore advised the ATEL representatives that the bus requirements had changed from 60 to 90 buses based on a recent DCPS report. (Lowe Dep. 14). This was the first indication ATEL had that the requirement was for 90, rather than 60, buses. During the meeting, Gilmore shared with the ATEL representatives a copy of the United States District Court order appointing him as Transportation Administrator for DCPS. (Lowe Dep. 17). Gilmore stated that he intended to use funds from the $11 million account that was established under the court order to bring DCPS's overdue account with ATEL current. (Lowe Dep. 19). The same $11 million account would be used to fund the new bus requirement. Gilmore indicated that he had authority to make procurement commitments on behalf of DCPS. (Hearing Tr. 28-29; Lowe Dep. 18; Benton Dep. 14-15). Gilmore later testified that although the court order provided him contracting authority, he would use DCPS ancillary services such as procurement and would make use of his contracting authority only if DCPS's contracting office was unable to timely execute the procurements that were needed. (Hearing Tr. 45-47).

When Connelly and Lowe indicated that ATEL was willing to proceed based upon Gilmore's assurances, the ATEL representatives and Gilmore then discussed at least one term concerning the anticipated contract, namely the length of the contract. ATEL proposed a term of 60 months. Although the testimony is conflicting, we find it more likely than not that Gilmore took no position but merely asked his associate, Kean, to "work out the details" with ATEL. Thus, it was understood by the meeting attendees that ATEL would submit a proposal after clarifying the details with Kean for the 90-bus requirement. (Lowe Dep. 22). Gilmore most likely knew about and recommended the actions taken by the DCPS contracting office starting in early to mid-July 2003. (Comisiak Dep. 64). He probably also knew about and perhaps directed that an RFQ for the 90 buses be sent to Laidlaw. He most likely gave instructions that directly or indirectly prompted Comisiak to email Laidlaw about the new bus requirement on July 30, coincidentally at the time Gilmore's meeting with ATEL was in progress.

ATEL states that it immediately began procuring (or at least identifying) the necessary 90 buses. Lowe attempted several times unsuccessfully to reach Kean by telephone after the meeting to work out the details of the proposal. Although ATEL representatives were unable to reach Kean, ATEL nevertheless submitted a letter proposal to Kean on August 4, 2003, reflecting the discussions Lowe and Connolly had with Gilmore during the July 30 meeting. ATEL quoted a price of $1,901 per month per "full-sized" vehicle for a 60-month lease-maintenance term. DCPS assumed that the price applied to a 48 passenger bus, but ATEL did not specify the size of the buses that it would be providing perhaps because it did not know the specifications for the 90 buses. That information was contained in the July 24 hand-annotated RFQ but ATEL never received that document or any other written form of solicitation or RFQ for the 90-bus requirement. (Lowe Dep. 36).

Laidlaw responded to the July 24 hand-annotated RFQ in a letter dated August 1, 2003, with a listing of the 90 specific buses that it proposed to provide. It quoted the same per vehicle per year price contained in its existing lease-maintenance agreement with DCPS. (Joint Ex. 9). On a monthly basis, the price was $1,827.43. Laidlaw modified its response by letter dated August 5, 2003, providing information about delivery, including possible delivery delays. (Joint Ex. 11).

The DCPS contracting officer, Annie Watkins, testified that the 90-bus requirement was a new and different requirement and that the prior 60-bus RFQ was "dead" as of August 1, 2003. (Watkins Dep. 34-35 (Joint Ex. 23)). Watkins understood ATEL's August 4, 2003 letter (Joint Ex. 10) to be its bid in response to the new 90-bus procurement. (Watkins Dep. 35). By emails exchanged on August 5, 2003, ATEL (Mr. Lowe) asked DCPS "when is my contract going to be available?" DCPS (Mr. Comisiak) responded, "When I say so." (Joint Ex. 12).

Gilmore and DCPS had determined that DCPS would only consider a 12-month lease. The facts show that neither Gilmore nor DCPS communicated to ATEL that its 60-month lease term proposal for the 90-bus requirement would not be considered unless the term was 12 months. Watkins testified that she never discussed with ATEL whether ATEL would have been willing to quote the 90 buses under a 12-month lease arrangement rather than the 60-month term provided in its letter proposal. (Watkins Dep. 31). It is also clear that Comisiak never discussed with ATEL whether ATEL would have been willing to price the 90 buses under a 12-month lease term. (*Id.*) We accept Lowe's testimony that DCPS never told ATEL that it would consider offers for the 90-bus procurement only if the offered term was 12 months or less. (Lowe Dep. 38). ATEL states that it would have quoted a price using a 12-month lease term if it had known that to be a requirement. Indeed, it previously had quoted a 12-month lease term for the 60-bus RFQ.

DCPS awarded Letter Contract No. GAGA-2004-C-0014 to Laidlaw on August 15, 2004. (Joint Ex. 14). The letter contract provides that Laidlaw was to lease to and maintain 90 buses for DCPS for the period August 27, 2003, through August 26, 2004, with a monthly vehicle lease/maintenance payment of $164,468.67. (Joint Ex. 14, at 4 (Section B.1)). The letter contract also states:

> DCPS intends to definitize this letter contract within 60 days from date of award of this letter contract, at which time this letter contract shall merge with the definitized contract.

> Before expiration of the 60 days, the Contracting Officer may authorize an additional period in accordance with [27 DCMR 2425.9] . . . . If DCPS does not definitize this letter contract within 60 days of the date of award . . . or any extension thereof, this letter contract shall expire. In the event of expiration of this letter contract, DCPS shall pay the Contractor for the services performed under this letter contract in an amount not to exceed $328,937.40 In no event shall the amount paid under this letter contract or any extension thereof exceed (50%) of the total definitized contract amount.
>
> The duration of the definitized contract shall be from date of award through one year thereafter. DCPS shall pay the Contractor for services performed during the first year of the definitized contract in an amount not to exceed $1,973,619.90.

(Joint Ex. 14, at 1). The letter contract provided the following timeline for definitizing the contract:

| | |
|---|---|
| September 1, 2003: | Transmit definitive contract to Contractor for signature. |
| September 5, 2003: | Transmit definitive contract to Board of Education for approval. |
| September 16, 2003: | Transmit definitive contract to City Council for Approval. |
| October 1, 2003: | Award definitive contract. |

Also on August 15, DCPS's Chief Procurement Officer, Debor Dosunmu, and Watkins executed a determination and findings ("D&F") in regard to the award of Contract No. GAGA-2004-C-0014. The D&F cites 27 DCMR § 1702.3(b) as "authorization." That provision authorizes a procurement on a sole source basis "based on the particular source's ownership or control of limited rights in data, patent rights, copyrights or trade secrets related to the required supplies." The D&F implies that Laidlaw is the only available source capable of supplying the buses in the timeframe needed by DCPS. (Joint Ex. 15).

On Tuesday, August 19, 2003, Lowe learned that additional school buses were arriving at the DCPS lot on New York Avenue. (Lowe Dep. 38; Joint Ex. 18). On September 2, 2003, ATEL filed with the Board its initial protest of the award by DCPS to Laidlaw. (CAB No. P-0678). On October 10, 2003, ATEL filed a supplemental protest (CAB No. P-0680), alleging that DCPS had not received approval from the Council pursuant to D.C. Code § 2-301.05a (requiring Council approval for contracts in excess of $1,000,000) for the Laidlaw contract. The Board consolidated the two protests. In a January 8, 2004 filing, DCPS responded to the supplemental protest ground as follows:

> The amount to be paid to the Contractor under the definitized contract is $1,973,619.90. The letter contract has not yet been definitized. Therefore, the maximum amount that could be paid under the letter contract is $986,809.95, or 50% of the definitized amount. Thus, D.C. Code Ann. § 2-301.05a is not implicated because the amount of the letter contract can not exceed $1,000,000.

The parties attempted to settle the protests but those efforts were unsuccessful. The Board conducted a hearing on March 10, 2004, to receive the testimony of David Gilmore. The parties thereafter filed closing briefs and replies.

On June 2, 2004, the Board conducted a telephone conference with the parties to inquire about whether the letter contract with Laidlaw had ever been definitized and submitted to the Council for approval. DCPS counsel states that Laidlaw is still providing the 90 buses to DCPS purportedly under the letter contract. DCPS explains that it decided not to definitize the letter contract and intended merely to let the letter contract expire at the end of the anticipated definitized contract term of August 26, 2004. In response to the Board's inquiries regarding any extension of the letter contract, DCPS submitted 6 modifications of the letter contract (documents that DCPS should have previously filed as part of its ongoing obligation to advise the Board of any changes to the contract at issue). Modification No. 1, dated October 13, 2003, extended the term of the letter contract through November 30, 2003, and increased the price from $328,937.40 to $581,122.04. Modification No. 2, dated November 21, 2003, extended the term of the letter contract through January 31, 2004, and increased the price to $897,146.64. Modification No. 3, dated February 26, 2004 (with an effective date of February 1, 2004), extended the term of the letter contract through February 29, 2004, and purported to increase the price to $1,048,611.90, but also contradictorily states that "the total letter contract value remains unchanged." Modification No. 4, also dated February 26, 2004 (with an effective date of February 1, 2004), purported to extend the term of the letter contract through May 31, 2004, and to increase the price to $1,529,122.38. Like Modification No. 3, it contains the statement that "the total letter contract value remains unchanged." Modification No. 5, dated March 5, 2004, "corrects the amount stated for each preceding modification" and purports to increase the price to $1,569,194.22. Modification No. 6, dated April 30, 2004 (with an effective date of March 5, 2004), purports to extend the term of the letter contract through June 30, 2004, and to increase the price to $1,736,817.11. It contains the statement that "the total letter contract value remains unchanged." All of the modifications are signed by Watkins, the DCPS contracting officer.

## DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

DCPS takes the position that the contracting officers in this matter correctly determined, based on the information presented to them, that Laidlaw was the only supplier of buses that was available to supply DCPS the 90 buses it needed for a one-year lease term at that time. DCPS points out that ATEL's proposal for a 60-month lease was inconsistent with DCPS's requirement for a 12-month lease term. Laidlaw's proposal correctly quoted the buses for a 12-month lease term. The problem with DCPS's argument is that the contracting officers and the contract specialist all admitted that ATEL was capable of providing the buses. The reason ATEL did not quote a 12-month term is that it was never informed by DCPS that a 12-month term was required. ATEL never received the hand-annotated RFQ of July 24, 2003, because Comisiak and the contracting officers never followed through to make sure that both suppliers had received the same RFQ. ATEL had quoted a 12-month term for the original 60-bus RFQ and there is nothing in the record to suggest that ATEL was incapable of quoting under the same terms for the 90-bus requirement. It did not do so because Gilmore asked ATEL at the July 30 meeting what terms it wished to have for a contract and ATEL had proposed a 60-month lease. Further, when ATEL attempted to contact Kean, who was Gilmore's assistant, to work out the details of the proposal, Kean never responded and ATEL was forced to submit a proposal with no guidance as to the length of the lease term as well as the quantities of the various sizes of the 90 buses needed by DCPS. To compound the error, Comisiak sent an email request for a quote to Laidlaw on July 30 but did not send a similar email to ATEL. After Laidlaw had submitted a quote on August 1 and ATEL had submitted a quote on August 4, it had to have been clear to the contracting officers and the contract specialist that the suppliers were not quoting to the same terms and specifications. Instead of contacting ATEL and asking it to resubmit a quotation according to the desired terms and bus specifications, DCPS's contracting officials did nothing to obtain a level of competition that was easily obtainable. DCPS ignored ATEL's inquiries and went ahead with an award to Laidlaw.

DCPS cites 27 DCMR § 1702. as its authority for making an award based on Laidlaw being the single available source. We do not agree with DCPS that the single available source authority is by nature something different from a sole source award. On the contrary, it is simply a species of a sole source award and therefore must meet the requirements for a sole source award. The Procurement Practices Act mandates fair and open competition in procurements except in very limited circumstances such as a sole source procurement authorized by D.C. Code § 2-303.05 which provides:

> (a) Procurement contracts may be awarded through noncompetitive negotiations when under rules implementing this section, the Director or the Director's designee determines in writing that one of the following conditions exists:
>
> (1) There is only 1 source for the required commodity, service, or construction item;
>
> (2) The contract is for the purchase of real property or interests in real property;
>
> (3) The contract is with a vendor who maintains a price agreement or schedule with any federal agency, so long as no contract executed under this provision authorizes a price higher than is contained in the contract between the federal agency and the vendor;
>
> (3A) The contract is with a vendor who agrees to adopt the same pricing schedule for the same services or goods as that of a vendor who maintains a price agreement or schedule with any federal agency, if no contract executed under this paragraph authorizes a price higher than is contained in the contract between the federal agency and the vendor; or
>
> (4) Contracts for the purchase of commodities, supplies, equipment, or construction services that would ordinarily be purchased on a competitive basis when an emergency has been declared pursuant to § 2-303.12.

DCPS did not meet the requirements for a sole source award in this case. The DCPS contracting officers and the contract specialist conceded that the only reason for awarding to Laidlaw was that Laidlaw had proposed a 12-month lease term and ATEL had proposed a 60-month lease term. But, it is equally clear that ATEL was never given an opportunity to propose a 12-month lease term for the 90-bus requirement. Indeed, ATEL was not even provided the quantities of buses by passenger size and specifications. Watkins' reason for not issuing a solicitation under the provisions for competitive sealed proposals is that she believed that neither supplier could deliver all 90 buses on short notice and that DCPS would therefore simply negotiate a modification of their existing (and apparently unexecuted) contracts and add additional buses to those contracts. But, in fact, DCPS did not add the 90 buses to the existing Laidlaw and ATEL contracts but rather executed a single new contract with Laidlaw.

The DCPS contracting personnel stated that the procurement of the 90 buses was not an emergency procurement as defined in D.C. Code § 2-303.12(a). DCPS contracting officials never prepared a determination declaring an emergency procurement as required by D.C. Code § 2-303.12(a)(3). In any event, even under what appeared to be emergency conditions here, DCPS could have and should have obtained competition from at least Laidlaw and ATEL. If DCPS had sent the same hand-annotated July 24 RFQ to both Laidlaw and ATEL, it would have achieved a reasonable measure of competition between these two suppliers.

In sum, DCPS violated basic procurement law by failing to justify the sole source award to Laidlaw, failing to use a competitive method for procuring the buses, failing to provide the same terms and specifications to the suppliers who were capable of competing, and failing to treat each of the suppliers in a fair and equal manner.

For the reasons discussed above, we sustain ATEL's consolidated protests. ATEL asserts that the violations were so substantial as to render the award to Laidlaw void *ab initio*. We find that the actions of DCPS were arbitrary and irrational, but we decline to conclude that the violations render the contract void *ab initio*.

Some of the errors resulted from a lack of diligence and poor contracting practices while others resulted from the unique situation of a newly court-appointed Transportation Administrator facing a critical need for additional buses with a new school year ready to begin. The contracting officer claims that she instructed the contract specialist to send the 90-bus requirement to both ATEL and Laidlaw. The contract specialist states that he thought he did send the requirement to both. The contracting officers and the contract specialist did not maintain proper records, being unable to produce any of the materials sent to Laidlaw or allegedly sent to ATEL. Only after we ordered DCPS to obtain the critical documentation from Laidlaw, which Laidlaw had in its files, were we able piece together some of the key events in the procurement. The contracting officer is responsible for making sure that procurements are properly done. The communications by the contracting office with the suppliers were vague, incomplete, replete with errors, carelessly transmitted, lacking proper instructions, and not maintained in the contract file. The contracting officer was not diligent in following up with the contract specialist to make sure that both suppliers had received the same requirements information against which to submit a quotation. And after the proposals (Laidlaw's August 1 proposal and ATEL's August 4 proposal) were submitted, the contracting officer certainly should have realized that DCPS had not provided the same information to both suppliers. At that point, the contracting officer should have contacted ATEL and discovered why it quoted a 60-month term rather than a 12-month term, and why it did not specify the quantities and specifications for the buses. With those actions, DCPS would have learned that ATEL did not receive the July 24 hand-annotated RFQ, and DCPS could have instructed ATEL to resubmit its quotation based on the RFQ rather than on the verbal and undefined terms given to ATEL by Gilmore.

As mentioned above, part of the problem also stems from the fact that the DCPS procurement personnel (contracting officer and contract specialist) were dealing with Laidlaw, while the court-appointed Transportation Administrator (Gilmore) was dealing (on a single occasion, *i.e.*, July 30) with ATEL at the critical time for the 90-bus procurement. ATEL was unable to get clear specifications from Gilmore or his assistant, Kean, the DCPS contracting office withheld vital information from ATEL, and ATEL did not know that DCPS contracting personnel were dealing with Laidlaw. Both suppliers thought that they were in individual negotiations for the 90-bus requirement. As a result, there was confusion among not only the bus suppliers (principally ATEL) but also Gilmore and the DCPS contracting office. Gilmore testified that he did not use the contracting authority he was granted in the court order which appointed him but in fact his "recommendations" were acted upon by the contracting officers and the contract specialist. In any event, it was the DCPS contracting officer, not Gilmore, who executed the letter contract with Laidlaw.

At this point, termination as a remedy is moot. The August 2003 letter contract that DCPS signed with Laidlaw has no legal force. By its terms, it was to be effective for 60 days, subject to extensions pursuant to 27 DCMR § 2425.9, which provides:

> The contracting officer shall execute a definitive contract within one hundred and twenty (120) days after the date of execution of the letter contract or before completion of fifty percent (50%) of the work to be performed, whichever occurs first. The contracting officer may authorize an additional period if the additional period is approved in writing by the head of the contracting agency.

DCPS has submitted extensions purportedly through June 30, 2004. However, the letter contract provides that in no event shall the amount paid under the letter contract or any extension exceed 50 percent of the total definitized contract amount of $1,973,619.90. Thus, the letter contract had a not-to-exceed amount of $986,809.95, which is less than the $1,000,000 threshold for Council approval under District law. Normally, only definitized contracts are submitted to the Council. D.C. Code § 1-204.51 (formerly D.C. Code § 1-1130 (2001)) provides in relevant part:

> (b) Contracts exceeding certain amount.
>
> (1) In general. -- No contract involving expenditures in excess of $ 1,000,000 during a 12-month period may be made unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with criteria established by act of the Council).

In addition, D.C. Code § 2-301.05a (entitled "Criteria for Council review of multiyear contracts and contracts in excess of $1 million") (formerly D.C. Code § 1-1181.5a (2001)) provides in part:

> (a) Pursuant to § 1-204.51, prior to the award of a multiyear contract or a contract in excess of $ 1,000,000 during a 12-month period, the Mayor or executive independent agency or instrumentality shall submit the proposed contract to the Council for review and approval in accordance with the criteria established in this section.
>
> . . . .

(d) After July 28, 1995, no proposed multiyear contract or lease and no proposed contract or lease worth over $ 1,000,000 for a 12-month period may be awarded until after the Council has reviewed and approved the proposed contract or lease as provided in this section.

(e) After July 28, 1995, any employee or agency head who shall knowingly or willfully enter into a proposed multiyear contract or a proposed contract or lease in excess of $ 1,000,000 without prior Council review and approval in accordance with this section shall be subject to suspension, dismissal, or other disciplinary action under the procedures set forth in § 1-616.01(d)(1) and (18). This subsection shall apply to subordinate agency heads appointed according to subchapter X-A of Chapter 6 of Title 1, and to independent agency heads.

(f)(1) No contractor who knowingly or willfully performs on a contract with the District by providing a product or service worth in excess of $ 1,000,000 for a 12-month period based on a contract made after July 28, 1995, without prior Council approval, can be paid more than $ 1,000,000 for the products or services provided.

Modification No. 3, which extended the term of the letter contract through February 29, 2004, exceeded the not-to-exceed amount by nearly $62,000, and also exceeded the $1,000,000 contract threshold for Council review and approval. There is no evidence in the record that DCPS even sought Council approval. DCPS explains that it decided not to definitize the letter contract and intended merely to let the letter contract expire at the end of the anticipated definitized contract term of August 26, 2004. The problem with this approach, as just stated, is that the value of services during the past 9 months has far exceeded the letter contract's not-to-exceed amount and the statutory threshold of $1,000,000 for Council approval. Those thresholds were exceeded by late February 2004. Accordingly, Laidlaw has been performing without a valid contract since then. Because DCPS has never received Council approval, performance by and payments to Laidlaw after late February 2004 violate D.C. Code §§ 1-204.51 and 2-301.05a. *See Second Genesis, Inc.*, CAB No. D-1100, Feb. 4, 2000, 48 D.C. Reg. 1480, 1489.

DCPS states that Laidlaw is still providing the 90 buses to DCPS purportedly under the letter contract. Because there is no valid contract for Laidlaw's current performance, we direct DCPS to promptly compete its requirements for at least the remainder of the intended definitized contract term. We understand that there is an outstanding DCPS solicitation for a major acquisition of approximately 580 buses. It is for DCPS to decide how best it will meet its current and future requirements using valid, competitive procurement procedures.

Pursuant to D.C. Code § 2-309.08(f)(2), we award ATEL its reasonable proposal preparation costs and cost of pursing the consolidated protests. ATEL submitted a request for $196,795, consisting of $95,570 for labor hours incurred by ATEL's CEO, CFO, and staff, and another $101,225 billed by ATEL's consultant (George Lowe). We have reviewed ATEL's submission and DCPS's response to that submission. We find that ATEL has not properly documented its request for costs. To verify costs, the Board requires that a protester:

> (1) submit the names of its employees who worked on the bid or proposal, (2) identify and describe the tasks performed, (3) submit documentation supporting the hourly rates and number of hours worked, and (4) document overhead and fringe benefits. In so doing, we also require an affidavit or verified statement from one or more of the protestor's principals, which contains the explanations of costs incurred. ... We do not mean to indicate that we require precise mathematical certainty in order to award bid or proposal preparation costs. However, we will not base awards on unsubstantiated claims by the protestor which engage the Board in mere speculation.

*Tito Contractors, Inc.*, CAB No. 363, Aug. 12, 1993, 41 D.C. Reg. 3597; *see also Recycling Solutions, Inc.*, CAB No. 377, June 30, 1995, 42 D.C. Reg. 4990. Further, the amount claimed must be reasonable. "[A] claim is reasonable if, in its nature and amount, the costs do not exceed those that would be incurred by a prudent person in pursuit of a protest." *Galen Medical Associates, Inc.*, B-288661.6, July 22, 2002, 2002 CPD ¶ 114. ATEL's submission does not include required documentation of the names of the employees, an explanation of what each employee did, support for the employee labor costs, a breakdown of the staff who incurred labor hours, and either payroll documentation establishing the hours incurred or affidavits from each attesting to the labor hours incurred. All we have is a single affidavit from Brian Benton, the CFO, with an attached exhibit (Exhibit A) which lists brief activity descriptions and numbers of hours in three categories, "CEO", "CFO", and "Staff." Nor is there any explanation of the "freight" cost of $6,000 contained in the same exhibit. Finally, the only support for the $101,225 fee of George Lowe of Van Scoyoc Associates, Inc., is an undated letter from Lowe to Benton (Exhibit B) stating that "our fees incurred to date with respect to the bid protest which has been on-going since August 2004 through current date presently aggregate $101,225.00." Billing records are needed for Lowe describing activities and hours incurred by date, evidence of billing rate, and a specification of the amount, date, and reason for incurring each cost other than labor.

The parties shall negotiate the appropriate amount due ATEL and DCPS shall promptly pay the agreed upon amount. If the parties cannot agree, they shall present the matter to the Board for resolution.

**SO ORDERED.**

DATED: June 3, 2004

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

| | | |
|---|---|---|
| TRINITY YOUTH SERVICES, INC. | ) | |
| | ) | CAB No. P-0684 |
| Under Solicitation No. CFSA-03-R-0005 | ) | |

For the Protester, DeMaurice F. Smith, Esq., S. Abena Glasgow, Esq., Latham & Watkins. For the District of Columbia Government: Howard Schwartz, Esq., Talia S. Cohen, Esq., Assistants Attorney General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

**OPINION**

*LexisNexis Filing ID 3683408*

Trinity Youth Services, Inc., protested its failure to make the competitive range in a procurement to provide congregate care services for the District of Columbia Child and Family Services Agency ("CFSA"). During debriefing, Trinity was informed that it received no points for past performance. CFSA apparently neglected to provide the evaluators the information concerning Trinity's past contract performance and that is the reason that Trinity received no points during the evaluation. CFSA has recognized the error, Trinity's past performance information has been sent to the contracting officer , and that information is being evaluated. Should the contracting officer determine that Trinity is in the competitive range based on the recomputed past performance score, Trinity will be invited to submit a best and final offer. The District has moved to dismiss the protest on the ground that the protest is now moot since the contracting officer has remedied the error which was the basis for the protest. Trinity has not responded to the motion. Accordingly, we dismiss the protest as moot.

**BACKGROUND**

On July 28, 2003, CFSA issued Solicitation No. CFSA-03-R-0005 ("RFP") requesting proposals to provide congregate care services for CFSA (Motion to Dismiss, Ex. 2). On August 29, 2003, CFSA issued one amendment to the RFP to further clarify the requirements and to provide responses to offerors' questions concerning the RFP. The RFP contained 11 contract line items ("CLINS") and the resulting contracts would be for a base period of one year and four option years for congregate care service for each CLIN. Offerors could submit proposals for one or all of the CLINS.

Trinity was one of 22 offerors that submitted proposals competing for the requirement of Traditional Group Home Care under CLIN 3. CFSA's License and Monitoring section forwarded to the evaluation team the past performance reports for all offerors that had previously provided congregate care services to CFSA, but omitted a report for Trinity. Therefore, the past performance evaluation team did not have any information from CFSA with which to consider Trinity's past performance on government contracts. (Motion, Ex. 1). On December 19, 2003, during the evaluation meeting, the evaluators determined that they could not consider Trinity's past performance references because the references were not contracts with "government agencies for which the Offeror has previously provided congregate care services." (Motion, at 2; Ex. 2, Section M.3.2, as amended). As a result, the evaluators scored Trinity a "0" for past performance.

On February 12, 2004, Trinity was notified by CFSA that it did not make the competitive range for proposals submitted for CLIN 3. Trinity requested a debriefing which was held on March 2, 2004, and learned that it received no points for past performance even though it had been providing congregate care services to CFSA since November 2001. (Protest, at 2). On February 25, 2004, Trinity filed its protest with the Board. Trinity challenged its past performance rating and the consequent determination that it was not within the competitive range. Trinity requested that CFSA reevaluate Trinity's past performance.

In an April 1, 2004 memorandum entitled "Contracting Officer's Determination for Trinity Services, Inc. Protest", the contracting officer agreed to conduct a reevaluation of Trinity's past performance using the past performance information subsequently obtained from CFSA. (Motion, Ex. 3). The District states:

> Should the Contracting Officer place Trinity in the competitive range, Trinity will have an opportunity to submit a Best and Final Offer. Moreover, CFSA has agreed to delay the final selections of Offeror for Traditional Group Home Care until Trinity has had the opportunity to submit a Best & Final Offer/Proposal, should Trinity be included in the competitive range based on the recomputed past performance score.

(Motion, at 3). The District states that because it has agreed to reevaluate Trinity's past performance, there no longer exists a basis for the protest and the protest is now moot.

## DISCUSSION

There is no dispute that the District has taken corrective action which resolves the basis for the protest. Trinity has not objected to the motion. Accordingly, we dismiss the protest as moot. Because the District has taken corrective action in a timely manner, we decline to award protest costs pursuant to D.C. Code § 2-309.08(f)(2).

**SO ORDERED.**

DATED: June 4, 2004

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA

# CONTRACT APPEALS BOARD

PROTEST OF:

| | | |
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| Fort Myer Construction Corporation | ) | |
| | ) | CAB No. P-0685 |
| Under Solicitation No. POKA-2003-B-0048-JJ | ) | |

For the Protester, Fort Myer Construction Corp.: Joe R. Caldwell, Jr., Esq., O. Kevin Vincent, Esq. and Robert J. Wagman, Esq., Baker Botts L.L.P. For the Intevenor, Capitol Paving of D.C.: Douglas Datt, Esq., Gavett and Datt, P.C. For the Government: Howard S. Schwartz, Esq. and Talia S. Cohen, Esq., Assistants Attorney General.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Warren J. Nash concurring.

## OPINION ON RECONSIDERATION

(*LexisNexis Filing ID* )

Fort Myer Construction Corporation was the second low bidder on each of the two award groups of a procurement for road repair services. The Lane Construction Corporation was the low bidder on each award group. Fort Myer protested against award to Lane alleging that Lane's bid was nonresponsive due to a failure to include a notarized subcontracting plan as part of its bid. The Board found the requirement to submit a subcontracting plan was a matter of responsibility and not responsiveness and denied the protest. Fort Myer has moved for reconsideration, asserting that the District, by establishing a "set-aside -- as opposed to a subcontracting goal – had the effect of creating an eligibility requirement," which is the equivalent of responsiveness. (Motion at 1). The District asserts that the requirement of a 50% "set-aside" of the contract value by the prime contractor for qualified subcontractors provided in the instant procurement is not the same type of "set-aside" as used in D.C. Code § 2-217 (2004) (Equal Opportunity For Local, Small, and Disadvantaged Business Enterprises) and implementing regulations, 27 DCMR § 801.4. (Opposition at 4-5). The Board agrees with the District and denies Fort Myer's motion for reconsideration.

## DISCUSSION

This Board has consistently held that a bidder on a "set-aside" contract which is not qualified at the time of bid opening in the category required by the solicitation, is ineligible to bid on the solicitation. *See, e.g., Barcode Technologies, Inc.*, CAB No. P-0524, Feb. 11, 1998, 45 D.C. Reg. 8723 and *J&K Distributors, Inc. of Washington, D.C. and Urban Service Systems Corp.*, CAB No. P-0432 & 0433, June 13, 1995, 42 D.C. Reg. 4986.

Fort Myer's allegation that the subject solicitation is for a set-aside contract is based on Section M.B. of the solicitation which provides:

> Under the provisions of 27 DCMR § 801.2(b) . . . **fifty percent (50%)** of the total dollar value of this contract has been set-aside for performance through subcontracting with local business enterprises, disadvantaged business enterprises, or resident business

ownerships. Any prime contractor responding to this solicitation shall submit with its bid or proposal a notarized statement detailing its subcontracting plan (See Clause C-1), Subcontracting Plan and Clause 2C-2, Liquidated Damages). Once the plan is approved by the contracting officer, changes will only occur with the prior written approval of the contracting officer.

Although the term "set-aside" is used in the cited provision, it is used in a colloquial, not a technical, sense. "Set-aside" is used in a technical sense as a contract offered in a "sheltered market" as distinct from an "open market" solicitation. *Horton & Barber Prof. Serv., Inc.*, CAB No. P-0651, May 20, 2002, 50 D.C. Reg. 7421, 7422 n. 4. Any entity is eligible for award as a prime contractor of an open market contract. Only qualified entities are eligible to bid on properly set-aside contracts. In the instant matter, the so-called set-aside was made pursuant to 27 DCMR § 801.2(b). That provision provides:

> The inclusion of clauses in open market solicitations that promote Local (LBE), Small (SBE) and Disadvantaged Business Enterprises' (DBE) participation in procurement, including clauses that:
>
> (1) Award a preference to offerors that include with their bids or proposals submitted in response to a solicitation a commitment to award particular subcontracts or a particular percentage of subcontracts to certified LBEs, SBEs or DBEs;
>
> (2) Establish particular goals for the award of subcontracts to certified LBEs, SBEs or DBEs; and
>
> (3) Designate particular subcontracts for award to certified LBEs or DBEs.

By its own terms, section 801.2(b) applies only to "open market solicitations." Proof of sheltered market qualification, or in this matter, a sheltered market subcontracting plan, is not required as a qualification for bidding on an open market solicitation. *Horton & Barber,* 50 D.C. Reg. at 7422.

Protester's Motion for Reconsideration is denied.

June 9, 2004

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

Concur:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge

/s/ *Warren J. Nash*
WARREN J. NASH
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
**CONTRACT APPEALS BOARD**

PROTEST OF:

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|---|---|---|
| Fort Myer Construction Corporation | ) | |
| | ) | CAB No. P-0688 |
| Under Solicitation No. POKA-2003-B-0048-JJ | ) | |

For the Protester, Fort Myer Construction Corp.: Joe R. Caldwell, Jr., Esq., O. Kevin Vincent, Esq. and Robert J. Wagman, Esq., Baker Botts L.L.P. For the Intevenor, Capitol Paving of D.C.: Douglas Datt, Esq., Gavett and Datt, P.C. For the Government: Howard S. Schwartz, Esq. and Talia S. Cohen, Esq., Assistants Attorney General.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Warren J. Nash concurring.

**OPINION**
*(LexisNexis Filing ID 3742512)*

Fort Myer Construction Corporation was the second low bidder on each of the two award groups of a procurement for paving services. The Lane Construction Corporation was the low bidder on each award group. Fort Myer protested against award of both award groups to Lane alleging that the solicitation forbids award of both award groups to the same contractor. The District asserts that the language of the solicitation does not require award of each of the two award groups to different contractors. The Board finds that the language relied upon is, at best, ambiguous, and that the ambiguity was apparent prior to bid opening. A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening . . . shall be filed with the Board prior to bid opening . . . ." Rule 302.2(a). As the subject protest was filed after bid opening, the protest is untimely. Fort Myer's protest is dismissed.

**DISCUSSION**

The subject solicitation was issued December 5, 2003, requesting bids for repairs to curbs, gutters, sidewalks, utility cuts, and base pavements citywide. On February 12, 2004, the Contracting Officer issued Addendum 3, which, among other changes, requested separate bids for work in Wards 1 through 4 and Wards 5 through 8. The addendum added a new Section I.19, entitled "Manner of Award" which states:

> It is the District's intention to make multiple awards to two separate contractors. Award, if made will be to a separate bidder in the aggregate for each group of items indicated by the Aggregate Award Group as listed below. Bidder must quote unit prices on each item within each group to receive consideration. In the event that the District is unable to make an aggregate award, the District may award on an individual basis each item within an aggregate award. NO BIDDER WILL BE AWARDED MORE THAN ONE AWARD GROUP. (Emphasis in original).
>
> I.19.1 Award Group 1- Wards 1, 2, 3 and 4
>
> I.19.2 Award Group 2 – Wards 5, 6, 7 and 8.

(Exhibit 1).

Although inartfully worded, the inserted clause clearly provided that the entire citywide requirement would not be awarded to a single contractor. The inserted clause divided the citywide requirements into two award groups and stated that the District would make awards to "two separate contractors." The clause emphasized its intent by summarizing at the end of the paragraph in all capital letters "NO BIDDER WILL BE AWARDED MORE THAN ONE AWARD GROUP."

On February 26, 2004, the contracting officer issued Addendum 4, which replaced[1] Section I.19 as added by Addendum 3 with a new Section I.19 reading as follows:

> It is the District's intention to award two separate contracts. Award, if made will be to a separate bidder in the aggregate for each group of items indicated by the Aggregate Award Group as listed below. Bidder must quote unit prices on each item within each group to receive consideration.
>
> I.19.1 Award Group 1 – Wards 1, 2, 3 and 4
>
> I.19.2 Award Group 2 – Wards 5, 6, 7 and 8.

(Exhibit 1).

The revised clause contained in Addendum 4 is less clear than the Addendum 3 clause, but, if read alone, it could reasonably be interpreted also to preclude award of both award groups to a single contractor. The first sentence of the Addendum 3 clause is modified in the Addendum 4 clause to state that the District intends to "award two separate contracts" instead of to make "multiple awards to two separate contractors." This modification of the language supports the District's assertion that award was permissible to only one contractor. The second sentence, however, remains unchanged. It reads "Award, if made will be to a separate bidder in the aggregate for each group." While the term "separate contracts" in the revised first sentence could include two contracts made with a single contractor, or two contracts made with two contactors, it is more difficult to read "a separate bidder . . . for each group" in the unchanged second sentence as meaning anything other than award to two separate contractors, since it would make little sense to refer to each of the bids from the same contractor for each of the separate award groups as coming from "a separate bidder." But the second sentence in Addendum 4 cannot be read in isolation. Addendum 4 followed and changed a clause inserted by Addendum 3. It is not therefore reasonable to assume the revised clause was not intended to make any change from the original clause. An interpretation which gives reasonable meaning to an amendment is preferred to an interpretation which renders the amendment superfluous. *See*, Restatement, Second, Contracts § 203, Comment b. This is particularly true where, as here, the drafter of Addendum 4 specifically deleted the emphasized notice that "no bidder will be awarded more than one award group." The deletion clearly indicated that the District intended to reserve the right to award both award groups to a single contractor. In context, the most reasonable interpretation of the Addendum 4 clause is that the District was permitted to award both award groups to a single contractor. At best, the language of the clause is ambiguous.

Fort Myer filed this protest after bid opening. Pursuant to statute and our rules, "[a] protest based upon alleged improprieties in a solicitation apparent prior to bid opening . . . shall be filed with the Board prior to bid opening . . . ." D.C. Code § 2-309.09 and Rule 302.2(a). "A bidder who fails to seek clarification of an ambiguity on the face of a solicitation prior to bid

[1] The Board assumes that the new language replaced the previous section of the same designation. The Addendum is silent as to whether the original § I.19 was to be deleted.

opening risks a contrary interpretation of the allegedly ambiguous provision and is precluded from raising such issues to the Board after opening." *Maryland Construction, Inc.*, CAB No. P-0650, Jan. 17, 2002, 50 D.C. Reg. 7398, 7399. Here, the better reading of Addendum 4's section I.19 is that the District retained the right to award both award groups to a single contractor. To the extent that the language could be read differently, Fort Myer was obligated to seek clarification prior to bid opening. It did not do so. Accordingly, the protest is dismissed as untimely.[2]

June 16, 2004

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

Concur:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge

/s/ *Warren J. Nash*
WARREN J. NASH
Administrative Judge

[2] In light of the Board's decision to dismiss the protest as untimely, Protester's Request for Discovery is denied.